

STONEMAN, CHANDLER & MILLER LLP

99 HIGH STREET
BOSTON, MASSACHUSETTS 02110

ALAN S. MILLER
ROBERT CHANDLER
CAROL CHANDLER
KAY H. HODGE
ROBERT G. FRASER
MACON P. MAGEE
REBECCA L. BRYANT
GEOFFREY R. BOK

TELEPHONE (617) 542-6789

FACSIMILE (617) 556-8989

WWW.SCMLLP.COM

NANCY N. NEVILS
JOAN L. STEIN
JOHN M. SIMON
KATHERINE D. CLARK
ANDREA L. BELL
COLBY C. BRUNT

MIRIAM K. FREEDMAN
OF COUNSEL

***Balancing the legal requirements of the IDEA,
NCLB, Section 504 in South Dakota—***

***Grades, report cards, tests, diplomas, honors,
accountability, and students with disabilities***

Miriam Kurtzig Freedman, M.A., J.D.

Stoneman, Chandler & Miller LLP, Boston, MA

**Miriam@schoollawpro.com
www.schoollawpro.com**

From confusion to confidence!

Miriam Kurtzig Freedman © 2006. Reproduction permitted only with the express consent of the author/presenter.

The information provided herein is intended to be used for general information only, and not as legal advice. In the event that legal advice is required, the services of an attorney should be sought.

MIRIAM KURTZIG FREEDMAN, M.A., J.D.

www.schoollawpro.com
Miriam@schoollawpro.com
miriamkfreedman@aol.com

Miriam Kurtzig Freedman works with people who seek better public schools and helps practitioners prevent lawsuits. An avid supporter of public education, she represents Massachusetts school districts, educational collaboratives, and charter schools. She provides legal services at all levels of dispute resolution and litigation: prevention, preparation, settlements/mediations, and hearings and courts. On behalf of public schools, she deals with state and federal agencies. On matters of report cards, high stakes testing, NCLB, and graduation issues, she has consulted with state departments of education and other key state and district agencies. She provides clients and national/regional audiences with lively and practical keynotes, training, consultation, and presentations, with particular expertise on the issues of education reform, standards, and including children with disabilities. Her entertaining presentations are in "plain English" and promote "best practices" among her audiences.

Miriam is a school attorney, consultant, speaker, and author. She has been an attorney at the Boston law firm of Stoneman, Chandler and Miller LLP since 1988, and is currently of counsel to the firm. A former Massachusetts hearing officer for eight years and public school teacher, she is a member of the National Speakers Association and is currently serving on the board of the New England Chapter. She is a member of the Massachusetts Bar Association. She is a founder of Special Education Day (December 2).

Areas of expertise include:

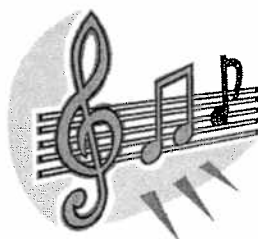
- Special education and Section 504
- Education reform under the No Child Left Behind Act
- Testing and accountability issues under state and federal laws
- Teacher empowerment
- SAT and ACT testing—and the public schools
- Promoting good practices for schools to prevent litigation
- Talkin' plain language among educators, parents, and others

A summary of Miriam's writing, speaking, and consulting experience is available. Several of her recent publications can be accessed through her website: www.SchoolLawPro.com. Her most recent book is *Grades, Report Cards, etc...and the Law*.

She received her law degree from New York University, her masters from the State University of New York, Stony Brook, and her bachelor of arts from Barnard College (Columbia University). During the 2004 and 2006 winter terms, Miriam was a visiting fellow at Hoover Institution, Stanford, California.

OUTLINE OF PRESENTATION

I.	Introduction: Why This Is So Important	4
II.	Key Definitions—especially new IDEA and NCLB terms	6
III.	Legal framework: Constitution, Section 504, IDEA, NCLB	11
IV.	The 2004 IDEA	18
V.	Inclusive practices	20
VI.	Appropriate accommodations and modifications	25
VII.	Grading	36
VIII.	Transcripts	47
IX.	Honors, gifted and talented programs	48
X.	Transition planning	51
XI.	Diplomas and graduation	54
XII.	Waivers and exceptions	62
XIII.	Policies and procedures--practical suggestions	65
Appendices		
	Acronyms	66
	Cases cited	67
	Suggested reading and websites	72
	Model 504 plan	74



1 I. Introduction: Why This Is So Important

2
3 Goals for today's presentation: You will gain:

- 4 • Knowledge. (Knowledge is power)
- 5
- 6 • Insight for good decision-making; knowing the difference
- 7 between the WHAT and the WHO!
- 8
- 9 • Action—from confusion to confidence! EXPERTS -That's US!

10
11 Specifically:

- 12
- 13 ◀ You will understand that we are in an education revolution, trying to
- 14 implement three federal laws that may not always work well together.
- 15 Remember the red light!
- 16
- 17 ▼ You will learn to act on the basis of legal basics, such as the Pyramid of
- 18 Laws, concept of a federal contract, import of notice to parents.
- 19 Think tennis!
- 20
- 21 ► You will appreciate teachers/educators as experts and "advocates"
- 22 for children...and nourish school-based expertise and advocacy.
- 23
- 24 ◀ You will know the one "product" you "sell" in the education
- 25 marketplace. By the way—what is it?
- 26
- 27
- 28 ▲ You will get practical suggestions and guidelines to use TOMORROW.
- 29 For starters--"consider," "it depends," "where to sue us," and what
- 30 my job is!
- 31
- 32 ◀ And, first, last and always, let's remember that it's
- 33 the RELATIONSHIP that matters!
- 34

35 For starters...

36
37 New from the NCLB:

- 38
- 39 ♥ Research-based instruction
- 40 ♠ Results-driven
- 41 ♦
- 42 ♣
- 43

44 Did you ever think you would need to be a lawyer to do your job? You don't!

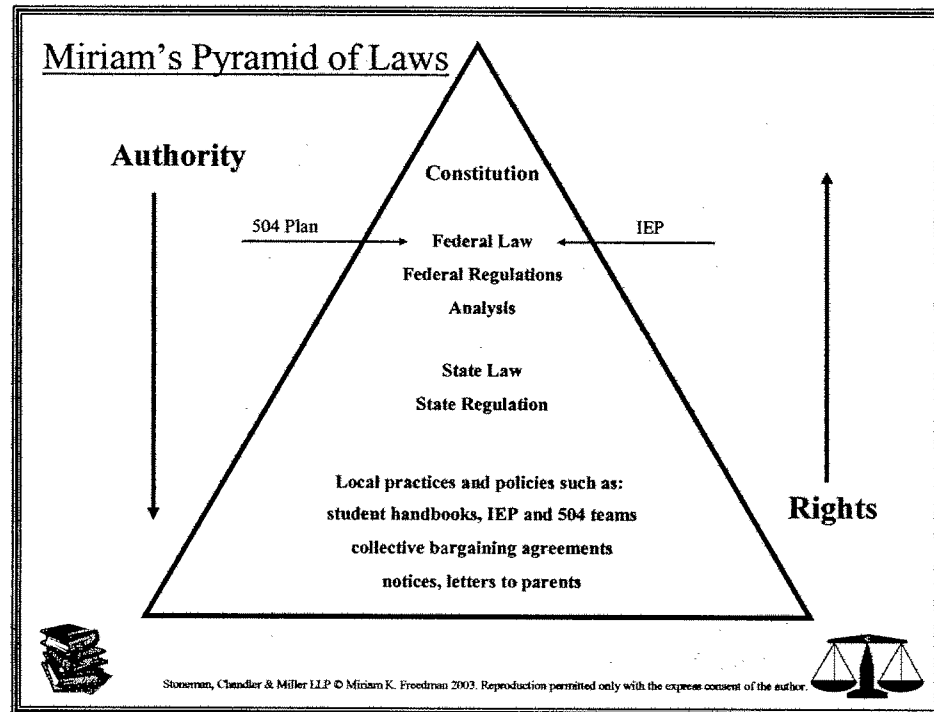
45
46 Have you done a readability study on letters and notices you sent home to parents?

47 If so, what was the result? If not, why not?

1 Have you used the term "fundamental alteration" at an IEP or 504 meeting? If not,
2 why not? If so, what happened when you did?

3
4 Can you believe that Congress has now defined what "reading" is and "research-
5 based" instruction?

6
7 Did someone say "paper reduction?" How many pages long is the NCLB? IDEA?
8 Section 504?
9
10



11
12
13 The No Child Left Behind Act of 2002 (NCLB). The 2004 Individuals with
14 Disabilities Education Improvement Act (IDEA). Standards-based education. Closing gaps.
15 Accountability. Research-based. The rubber begins to meet the road.

16 From the overarching NCLB¹ and IDEA 2004 to the state house and schoolhouse,
17 these topics are "hot." On talk shows, editorial pages, at the grocery line: everyone has an
18 opinion. (After all, we've all been to school!) The main concern is leaving no child
19 behind...But, lurking not far behind is the issue of appropriately including students with
20 disabilities (SWD) in these endeavors—determining which students are eligible for IDEA

¹ See, the list of acronyms in the Appendix, page 78.

1 or Section 504 services, understanding due process, and transitioning them from the K-12
2 setting to post-secondary opportunities. These are today's challenging issues.

3 **Educators** want to do the right thing. **Legislators, parents, and taxpayers** want
4 positive results. **Parents** want to help their children. Presumably, all stake holders want
5 to avoid disputes and litigation. But how? This presentation focuses on legal underpinnings
6 of, and provides practical approaches to, these vital endeavors.



8 9 10 11 **II. Let's begin at the very beginning with key definitions--as definitions are *KEY***

12
13 We begin with definition of terms. Agreement on what words mean is key to
14 effective policies and practices. These definitions will be used consistently today.

15 **Access:** The right to use, enter, or have an opportunity.

16
17 **Adaptation:** The umbrella term, covering both an accommodation and a
18 modification.²

19
20 Simply stated, it's the "**stuff**" you do for students with disabilities that is
21 **different** from what you do for other students. "Stuff" is not a legal term. It works!

22
23 **Accommodation:** **Change** in course/standards/test presentation, location,
24 timing/scheduling, expectations, student response, and/or other attribute which is
25 **necessary** to provide **access** for a student with a disability to participate in a
26 course/standard/test and demonstrate what she knows and can do, and **which does not**
27 **fundamentally alter or lower the standard or expectations of the**
28 **course/standard/test.**

² IDEA 2004 uses the term "appropriate accommodations." It no longer uses the term "modifications." Instead, the 1997 IDEA used the terms "accommodations" and "modifications." Adding confusion, NCLB uses "adaptations" and "accommodations," while the Section 504 uses the terms "aids, benefits, and services." All terms are undefined.

1 **"Appropriate accommodation:"** An accommodation that is "necessary to measure
2 the academic achievement and functional performance of the child on State and
3 districtwide assessments consistent with section....[of the IDEA]." 20 USC
4 1414(d)(1)(A)(i)(vi)(aa). Compare with IDEA'97 definition!

5
6 States are to provide guidelines. 20 USC 1412(a)(16)(B).
7

8 **Alternate assessment:** An assessment that substitutes for the State or district-
9 wide assessment, which is determined to be appropriate for a specific student by her IEP
10 Team. The NCLB contemplates 2 types of alternate assessments.
11

12 **Modification:** A change in course/standards/test presentation, location, timing/
13 scheduling, expectations, student response, and/or other attribute which is **necessary** to
14 provide **access** for a student with a disability to participate in a course/standard/test and
15 to demonstrate what she knows and can do, **but which does fundamentally alter or lower**
16 **the standard or expectations of the course/standard/test.**³ Sometimes called non-
17 standard accommodation.
18

19 **"252's":** Thanks to Dr. Perry Zirkel. These are neither accommodations nor
20 modifications! They are "good teaching practices."
21

22 **Reliability:** The extent to which test results can be generalized over time and
23 among scorers. The extent to which a student's score remains the same if the test is
24 readministered (assuming no further learning, practice effects, or other change) by
25 another test administrator.
26

27 **Validity:** The extent to which a test actually measures what it is intended to
28 measure. Note that a test that is valid for one purpose may not be valid for another. See
29 34 C.F.R. § 104.35 (b) (1).
30

31 The NCLB requires that assessments be "Valid, reliable,...and have "adequate
32 technical quality for each purpose required under the NCLB Act."
33

34 **"Fundamental" alteration:** A major, substantial "big" change.
35

36 **High stakes testing:** Test in which the results have consequences determined to be
37 "property interests" by the courts for the students who take them, **such as graduation or**
38 **a high school diploma.** Under this definition, NCLB testing is NOT high stakes testing
39 because consequences flow to schools and districts, not students. North Dakota does
40 NOT now have a high stakes test.
41

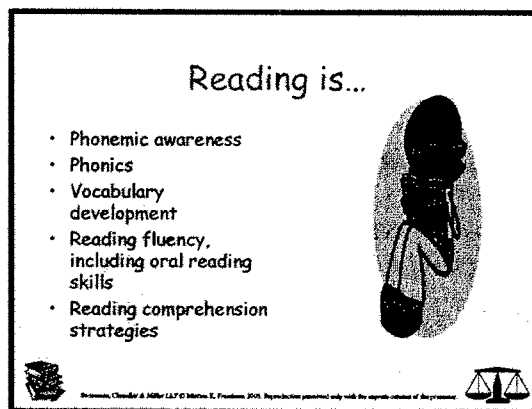
42 **The WHAT vs. WHO of Testing.** First the WHAT; then the WHO.
43

44 The new IDEA (incorporating language from the NCLB) specifically define the WHAT of
45 reading instruction.

³ Terminology at the post-secondary level is different. An accommodation is called a "reasonable accommodation." A modification is, most likely, deemed unreasonable and thus, not required or provided.

1 **Reading:** NCLB defines the "essential components of reading instruction" to mean
2 explicit and systematic instruction in:

- 3 ○ (A) phonemic awareness;
 - 4 ○ (B) phonics;
 - 5 ○ (C) vocabulary development;
 - 6 ○ (D) reading fluency, including oral reading skills; and
 - 7 ○ (E) reading comprehension strategies.
- 8



9
10
11 **Benefit: CAVEAT:** Use the NOUN, not the VERB! A benefit is not a need.

12
13 **Consent:** School districts should provide parents with all relevant information they
14 need in order to make an informed decision....in language they can understand. NO
15 JARGON!⁴

16
17 **Consider:** To think about carefully; to think of especially with regard to taking
18 some action; to take into account.⁵

19
20
21 **Diploma, Regular:** A document certifying the completion of district and state-wide
22 requirements for high school graduation.

23
24 **Modified Diploma/Certificate of completion:** A document signifying the completion
25 of secondary education which is other than with a regular diploma.

26
27
28
29 **Discrimination:** The act of discrimination; the process by which two stimuli are
30 responded to differently; the act, practice, or an instance of discriminating categorically
31 rather than individually.⁶

32

⁴ Note that IDEA 2004 expanded the definition of a parent to include a foster parent and a person acting as a parent. See Biddeford School District (SEA ME 2005).

⁵ Webster's Ninth New Collegiate Dictionary, Merriam-Webster, 1988.

⁶ Id.

1 **Otherwise qualified individual:** A person who is able to meet the essential
2 requirements of the program/course/test in spite of his/her disability.

3
4 **Unlawful discrimination:** In this arena, the act of discrimination against an
5 otherwise qualified individual that is based (solely) on the individual's disability.

6
7 **Impairment:** A medical or psychological/psychiatric condition. It differs from a
8 **disability/handicap**, which is a legal conclusion, made by the IEP or 504 Team.

9
10
11 **FAPE:** This is the **one product!** Free appropriate public education. **KEY!** The
12 definition is different under the IDEA and Section 504.

13
14
15 **Research-based instruction:** While IDEA 2004 does not define this term, the
16 NCLB does—and the IDEA incorporates that definition.

17 “(A) research that involves the application of rigorous, systematic, and objective
18 procedures to obtain reliable and valid knowledge relevant to education activities and
19 programs; and

20 (B) includes research that-

21 (i) employs systematic, empirical methods that draw on observation or experiment;

22 (ii) involves rigorous data analyses that are adequate to test the stated hypotheses
23 and justify the general conclusions drawn;

24 (iii) relies on measurements or observational methods that provide reliable and
25 valid data across evaluators and observers, across multiple measurements and
26 observations, and across studies by the same or different investigators;

27 (iv) is evaluated using experimental or quasi-experimental designs in which
28 individuals, entities, programs, or activities are assigned to different conditions and with
29 appropriate controls to evaluate the effects of the condition of interest, with a
30 preference for random assignment experiments, or other designs to the extent that those
31 designs contain within-condition or across-condition controls;

32 (v) ensures that experimental studies are presented in sufficient detail and clarity
33 to allow for replication or, at a minimum, offer the opportunity to build systematically on
34 their findings; and

35 (vi) has been accepted by a peer-reviewed journal or approved by a panel of
36 independent experts through a comparably rigorous, objective, and scientific review.”

37
38 20 USC 7707(b)(37).

39
40 The IEP should include a “statement of special education and related services and
41 supplemental aides and services based on peer-reviewed research to the extent
42 practicable to be provided to the child.”

1 **Opportunity:** A favorable juncture of circumstances; a good chance for
2 advancement or progress.⁷ (OB and PORTUS!)

3
4 **Outcome:** Something that follows as a result or consequence.⁸ As in "outcome
5 based education reform."

6
7 **Parens Patriae:** Latin, meaning "parent of the country." Informally, the role of the
8 "super parent." To be discussed at the presentation.

9
10 **Transition:** "...a coordinated set of activities for a child with a disability that is
11 designed within a *results*-oriented process, that is focused on improving the academic and
12 functional achievement of the child.....based on student needs, taking into account
13 *strengths*, preferences, and interests...."

14
15 **QUERY:** Which verb is noticeably absent?



16
17 **# 1: "Getting" these definitions.**

18
19 What is the difference between an equal opportunity and outcome?

20
21 A. ----between the WHO and the WHAT of testes, trades, and
22 standards.

23
24 B. ----between an "otherwise qualified individual with a disability" and one
25 who is not "otherwise qualified."

26
27 A useful way to "get" this is to focus on the terms: "*but for*," "*because of*," and
28 "*in spite of*" a disability. Southeastern Community College v. Davis (1979).⁹ In this seminal
29 case, the Supreme Court answered this Section 504 question: who is otherwise qualified?

30 The Court rejected the "*but for*" argument, that, "*but for*" the disability she was
31 qualified. Instead, the Court adopted the "*in spite of*" argument: in spite of her
32 disability, was she qualified? An "otherwise qualified person is one who is able to meet all
33 of the program's requirements in spite of his handicap." Six years later...

7 Webster's Ninth New Collegiate Dictionary, Merriam-Webster Inc., 1988.

8 Id.

9 For full citations of all cases, please refer to the Appendix.

1 Alexander v. Choate (1985). Here, the Supreme Court fine-tuned the question of
2 who is "otherwise qualified" by balancing that definition with "reasonable accommodation."

3 An individual is "otherwise qualified" if he/she can meet the essential requirements of the
4 program in spite of the disability—with or without accommodations. Alas, while this
5 standard is less harsh than Davis, it is harder for schools and others to implement because
6 it calls for professional judgment. Which requirements are **essential**? What is
7 **reasonable**? Who decides?

8
9
10 **III. The Legal Framework (Relevant sections of laws in chronological order)**

11
12 **THE CONSTITUTION**

13
14 **THE TENTH AMENDMENT**

15
16 *The powers not delegated to the United States by the Constitution, nor prohibited*
17 *to it to the States, are reserved to the States respectively, or to the people.*

18
19 **THE FOURTEENTH AMENDMENT** (adopted July 8 1868).

20
21 Section 1

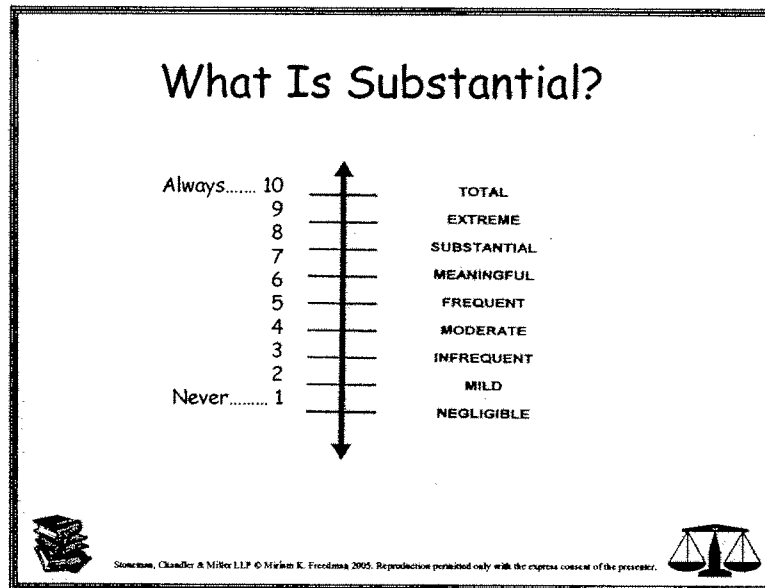
22
23 *All persons born or naturalized in the United States, and subject to the jurisdiction*
24 *thereof, are citizens of the United States and of the State wherein they reside.*
25 *No State shall make or enforce any law which shall abridge the privileges or*
26 *immunities of citizens of the United States; nor shall any State deprive any*
27 *person of life, liberty, or property, without due process of law; nor deny to any*
28 *person within its jurisdiction the equal protection of the laws.* (Emphasis added).

29
30 **SECTION 504 OF THE REHABILITATION ACT OF 1973** (Section 504) (Selected
31 portions of the law and regulations)

32
33 *No otherwise qualified individual with a disability. . . shall solely by reason of her or*
34 *his disability, be excluded from the participation in, be denied the benefits of, or*
35 *be subjected to discrimination under any program or activity receiving Federal*
36 *financial assistance. 29 U.S.C. § 794(a).*

37
38 *A person is considered to be a "disabled person" under Section 504 when he/she*
39 *has "a physical or mental impairment which substantially limits one or more major*
40 *life activities, has a record of such impairment, or is regarded as having such an*
41 *impairment."* 29 U.S.C. §706(8)(B).

1 **CASE EXAMPLE.** Westport Board of Education (SEA CT 2003). "An
2 adverse effect is not the same as a substantial impairment."
3



4
5
6 Discrimination Prohibited (34 C.F.R. §104.4(2))

7
8 *...aids, benefits, and services, to be equally effective, are not required to produce*
9 *identical result or level of achievement for handicapped and nonhandicapped*
10 *persons, but must afford handicapped persons equal opportunity to obtain the same*
11 *result, to gain the same benefit, or to reach the same level of achievement, in the*
12 *most integrated setting appropriate to the person's needs.*

13
14 Evaluation placement(34 C.F.R. §104.35)

15
16 (b) Evaluation procedures

17
18 *A recipient...shall establish standards and procedures for the evaluation and*
19 *placement of persons who, because of handicap, need or are believed to need*
20 *special education or related services which insure that:*

21
22 (1) *Tests and other evaluation materials have been validated for the specific*
23 *purpose for which they are used and are administered by trained personnel in*
24 *conformance with the instructions provided by their producer...;*

25
26 (3) *Tests are selected and administered so as best to ensure that, when a test*
27 *is administered to a student with impaired sensory, manual, or speaking skills, the*
28 *test results accurately reflect the student's aptitude or achievement level or*
29 *whatever other factor the test purports to measure, rather than reflecting the*
30 *student's impaired sensory, manual, or speaking skills (except where those skills are*
31 *the factors that the test purports to measure).*

1 **OCR EXAMPLES.**

2
3 North Carolina Department of Public Instruction (OCR 2005). North Carolina's testing
4 policy upheld. Students with scribes were not scored for convention section of the test, as
5 use of scribe invalidated purpose of test. No unlawful discrimination found.

6
7 Community (IL) Consolidated School District # 15 (OCR 2005). Not listing percentile
8 ratings for students whose tests were not valid not discriminatory.

9
10 *Remember: Don't "check" common sense at the door! A teacher does NOT need a*
11 *504 plan in order to accommodate a student; good teaching is still good teaching!*
12



13 **# 2: Getting these laws down... What's the difference....**

14
15 **C. ---- between a person with a disability who has - or has no - mitigating**
16 **assistance of aids, services, self-accommodation, etc.**

17
18 Sutton v. United Air Lines, Murphy v. UPS and Albertsons v. Kirkingburg (1999).

19
20 What is impact in the public school arena?

21 **D. ---- between a person with a medical condition (an 'impairment') and a**
22 **person with a disability or handicap covered by these laws.**

23
24 In 2002, the Supreme Court rendered a decision, Toyota Motor Mfg. v. Ella Williams

25 (2002), which clarified the meaning of "major life activity." A major life activity "must
26 be of central importance to daily life."

What 504 is NOT!

1. It's NOT for "252's." Thank you, Dr. Perry Zirkell!
2. It's NOT for "1008's" either!
3. It's NOT for students who are WBFWR. Thank you, Jim Walsh!
4. Because it's all about the PYRAMID OF LAWS, a 504 plan does NOT have an end date or list a meeting date a year out...
5. It's NOT a plan with a "discussion of progress."
6. It's NOT a mini-IEP.
7. It's NOT a way to help students pass tests and get into college.
8. It's NOT a student success plan. In fact, the word "success" belongs nowhere on a 504 plan!
9. It's FAPE is very different from an IEP FAPE.
10. It's NOT a consolation prize for students who don't need an IEP.
11. Eligibility is a process; it's NOT a conclusion.
12. It does NOT list student strengths or how the student is doing or improving.
13. It does NOT need parental consent for placement.
14. The federal law does NOT require the parent's participation or attendance. Does your state? District?
15. It does NOT protect every impairment.
16. It's all about degree of impact. Every impairment is NOT a 504 -protected disability or handicap.
17. It's NOT a benefit plan; it's a needs plan.
18. It's only for necessary accommodations; it's NOT for ANY modifications.
19. It's NOT for many accommodations. A few will do!

1 **THE NCLB.** See Appendix for useful websites.

2 On January 8, 2002, President Bush signed the NCLB of 2001. This law amends and
3 reauthorizes the Elementary and Secondary Education Act (ESEA).

4
5 **Additional NCLB terminology (besides the terms defined above):**

6
7 **Adequate Yearly Progress (AYP):** Adequate yearly progress so that all students
8 are "proficient" by the year 2013-14. State standards include at least three levels: basic,
9 proficient, advanced. States' criteria (set in 2003) must be statistically valid and reliable.
10 States determine the meaning of "proficient." AYP demonstration is primarily based on
11 assessments.

12
13 **It all depends on what ALL means!**

14
15 The law includes a "safe harbor" formula for group(s) of students who may not
16 make AYP. A school shall be considered to have made AYP if the percent of students in
17 the group that did NOT meet the proficient level of academic achievement on the state
18 assessment that year decreases by 10% of that percentage from the prior year AND that
19 group made progress on one or more of the academic indicators; and (not less than 95% of
20 all targeted groups participated in testing).

21
22 The US Department of Education (ED) continues to carve out exceptions and
23 flexibility for states in defining AYP, as outlined above.

24
25 **One % cap:** The NCLB places a cap of one percent on the number of
26 students under the IDEA with the most "significant cognitive impairments" whose
27 proficient scores can count toward the district's AYP determination. The cap does not
28 limit the number of students who take alternate achievement assessments, as that
29 determination is made by IEP teams.

30
31 **Two % cap:** Since April 2005, the DOE has allowed states to seek
32 flexibility through an additional 2% cap for students with "persistent academic
33 disabilities" who use alternate assessments based on modified achievement standards. In
34 December 2005, it issued draft regulatory amendments.

35
36 **Alternate assessments:** The NCLB includes the option of two different
37 alternate assessments for IDEA-eligible students (not 504-only eligible students):
38 alternate assessment for academic content standards at the grade level and alternate
39 achievement assessment for students who are not working at the grade level. Out-of-level
40 testing cannot now be an alternate achievement assessment.

41
42 **Parents Right to Know:** NCLB requires notification to parents at several stages
43 in a **uniform and understandable (!) format**, including in Title I schools, notice of teacher
44 and paraprofessional qualifications, notice if substitute teacher is "unqualified" for four
45 weeks, rights to SES or transfer, etc.--all in language the parents can understand.

1 **Reading:** NCLB defines the "essential components of reading
2 instruction" to mean explicit and systematic instruction. See above.

3
4 And see the 2003 NCLB requirement for parents of all SWD:

5
6 *Current Section 200.6 requires that the IEP team determine the accommodations*
7 *necessary to measure the academic achievement of students with disabilities*
8 *relative to the State's academic content and achievement standards for the grade*
9 *in which the student is enrolled. Through the IEP process, parents should be*
10 *informed of the potential consequences, if any, for their child if he or she*
11 *participates in [different testing options.] (For example, a parent should be*
12 *informed if a State will not allow a student to graduate with a regular diploma if he*
13 *or she takes an alternate assessment based on alternate achievement standards.)*
14 (Emphasis added).

15
16 34 CFR Part 200, December 9, 2003.

17
18
19 **Sample of case law about the NCLB:**

20
21 North East Independent School District (SEA TX 2003).

22
23 Visually impaired child's score of zero on a state test did not mean that child did not
24 receive a FAPE. Evidence demonstrated that child benefited from his program and made
25 progress as a result. The test format interfered with the child's ability to successfully
26 complete the test at an appropriate level.

27
28 Association of Community Organizations for Change Now (ACORN) v. New York City
29 Department of Education (N.Y. 2003). This case of first impression dealt with the
30 question: can parents sue under the NCLB? That is, do they have a right of action to bring
31 a lawsuit alleging violations of the NCLB? The New York court that fielded this question
32 answered NO. The NCLB does not grant parents the right to sue in court or at a due
33 process hearing. Citing to the Supreme Court decision in Gonzaga University v. ED (US
34 2002) (and New York law), the court found that the NCLB contains no provisions for
35 parents or students to bring lawsuits or seek damages if they allege a noncompliance with
36 the NCLB.



3 "Getting" these ideas...

- E. What is the difference between the two types of alternate assessments contemplated in the NCLB?
- F. What is research-based instruction? Reading? IDEA eligibility?
- G. What should schools do if they perceive a conflict between laws?

Meanwhile, back to special education...

Supreme Court standard for a free appropriate public education (FAPE)

Board of Education of Hendrick Hudson Central School District v. Rowley (1982).

The Supreme Court set forth a two-part test for FAPE: (1) compliance with the procedures of the law, and (2) the substantive standard, as per the following:

*We therefore conclude that the 'basic floor of opportunity' provided by the Act consists of access to specialized instruction and related services which are individually designed to provide educational **benefit** to the handicapped child.*

(w)hatever Congress meant by an "appropriate" education, it is clear that it did not mean a potential-maximizing education.

(P)ersonalized instruction with sufficient support services to permit the child to benefit educationally from that instruction....In addition, the IEP...should be formulated in accordance with the requirements of the Act and, if the child is being educated in the regular classrooms of the public education system, should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.

...the intent of the Act was more to open the door of public education to handicapped children on appropriate terms than to guarantee any particular level of education once inside..

The IDEA does not mandate results; rather, it mandates access to specialized and individualized services for children with disabilities.

Note the Supreme Court's use of the "door" of opportunity metaphor and the use of the word "benefit" as a NOUN!



4 "Getting" these down...

H. Many lawyers question whether the FAPE definition will change because of NCLB's AYP requirement? What does research-based instruction have to do with it? Your thought?

I. What is the difference between a FAPE under the IDEA and under Section 504?



Always remember what the Team's job is—and isn't!

IV. The 2004 Individuals with Disabilities Education Improvement Act (IDEA)¹⁰ Selected portions of the 2004 statute to be discussed include:

Congressional findings and purpose, 20 USC 1401

1401...Selected IDEA findings/ purpose

- To meet challenging expectations—using "scientifically based instructional practices, research"
- Strengthen role and responsibility of parents
- To focus on academic achievement and functional performance
- To maximize accessibility—technology and universal design
- To resolve disputes "in positive and constructive ways"
- To reduce paperwork burdens...



Skovman, Chandler & Miller LLP © Miriam K. Freedman 2005. Reproduction permitted only with the express consent of the presenter.



Definitions, 20 USC 1402

1 Paperwork reduction, 20 USC 1409

2
3 Participation in assessments, 20 USC 1412

4
5 Evaluation procedures, IEPs, regular education teacher role, referral/eligibility, 20
6 USC 1414

7
8 Procedural Safeguards, 20 USC 1415



9
10
11 Always remember whose Team meeting it is!

12
13
14 A few highlights of IDEA 2004...

15
16 IEP TEAM COMPOSITION, generally at 20 USC 1414 (d).

17
18 Process for Excusing Attendance

19
20 IDEA 2004 has a process for excusing Team members at a meeting in one of 2 situations.

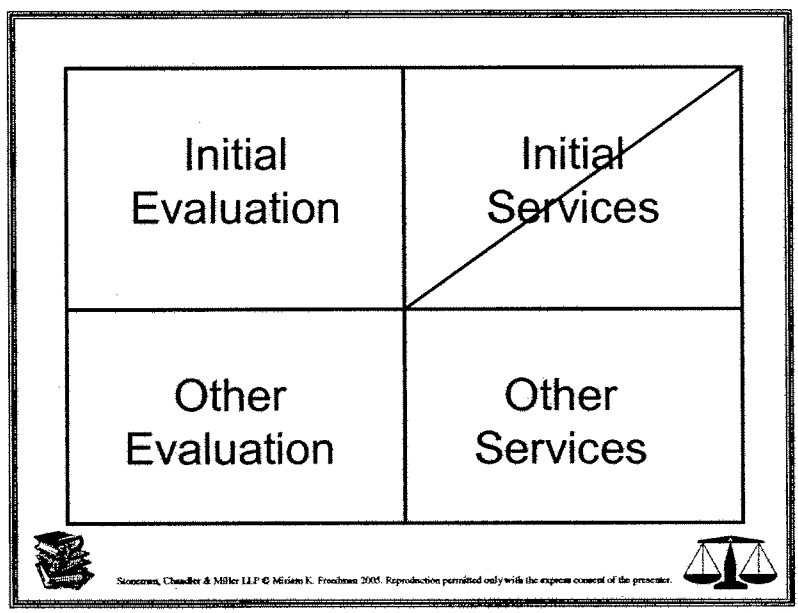
21
22 Attendance Not Necessary: A Team member is not required to attend a Team meeting (in
23 whole or in part) if the parent and the LEA agree that the member's attendance is not
24 necessary because the member's area of the curriculum or related service is not being
25 modified or discussed at the meeting.

26
27 Attendance Excused: A Team member may be excused from attending a Team meeting (in
28 whole or in part) when the meeting involves a modification to or a discussion of the
29 member's area of the curriculum or related services if (a) the parent and LEA consent to
30 the excusal and (b) the member submits written input into the development of the IEP to
31 the parent and other Team members prior to the meeting.

32
33 A parent's agreement/consent in both situations must be in writing.

34
35 Recall the four basic elements of parental waivers and consent.

- 36
37 ♠ Voluntary
38 ♥ Informed
39 ♦ Revocable
40 ♣ Written



Procedural Safeguards Notice (Often, a state's Parents' Rights Brochure)

Parents' rights brochure must be given to parents only once a year except that a copy must be given to parents (1) upon initial referral or parent request for evaluation; (2) upon the 1st occurrence of the filing of a due process complaint; and (3) upon request by the parent.

Sample of cases applying IDEA requirements:

Regular educator at meeting:

Shapiro by Shapiro v. Paradise Valley Unified School (9th Cir. 2003).

The 9th Circuit ruled that the district denied a FAPE to a 7-year-old child with a cochlear implant because it failed to have parents or any teachers from the private school where the student was unilaterally placed at the IEP Team meeting. The district should have had the private school teacher who knew the student--not its own teachers. And see 9th Circuit decision in M.L. v. Federal Way School District (9th Cir. 2004), with similar result. Absence of a regular educator at the IEP Team deemed a "critical structural defect" and a denial of a FAPE. Compensatory private school tuition was ordered.

1 IEP is an on-going process:

2 Kevin T. v. Elmhurst Community School District # 205 (N.D. Ill. 2002).

3 District was ordered to pay for a private day school until the student turned 22 because it
4 did not reconvene the Team in spite of student's poor grades, failed to consider his need
5 for assistive technology, waited until he was 17 years old to offer a transition plan,
6 graduated him on the basis of accumulated credits and not his IEP goals, and did not
7 specify why he would not participate in statewide assessments.

8
9 Goleta Union Elementary School District v. Ordway (D.C. CA 2002). Parent permitted to
10 proceed to seek monetary damages under Section 1983 for violations of the IDEA,
11 including the director's liability for improper transfer of a student (to program requested
12 by the parent) without a Team meeting.

13
14 And recall, Doe v. Withers (W. VA Cir. Ct. 1993). A high school history teacher was found
15 personally liable for money damages under Section 1983 due to his **intentional refusal** to
16 implement the IEP services (oral testing) for a student with learning disabilities who was
17 in his regular education class.

18
19 V. Inclusive practices: grades, report cards, tests, standards, graduation,
20 diplomas, etc.

21
22
23 It is well-settled that setting graduation standards is a state and/or district function.
24 See Letter to Wellington-Davis, the 10th Amendment above, OSEP's Letter to Anonymous
25 (OSEP 1994), and Student No. 9 v. Board of Education (MASS. 2004). Neither the NCLB
26 nor IDEA includes graduation standards.

As well, courts have upheld a state's right to have an exit exam over the last 20 or so years. Note: while neither the NCLB nor IDEA deal with graduation standards, they do not bar states from assigning promotion and retention decisions to IEP Teams. Letter to Davis-Wellington (OSEP 2003). And for other, non-graduation standards, courts and hearing officers are even more deferential to educators and state policies. See, e.g., Palm Beach County School Board (SEA FL 2004), where a hearing officer refused to exempt a third grader from the state's mandated standardized test (used for promotion/retention decisions).

Tests come in two flavors: high stakes and non-high stakes tests. For high stakes testing, we begin with the two Constitutional requirements:

A high school diploma is a protected property interest subject to the Fourteenth Amendment due process requirements. Debra P. v. Turlington (11th Cir. 1984).

The Constitutional requirements are:

A. Fair testing and "opportunity to learn" (OTL)

The fair test requirement (also known as OTL) is Constitutional. Simply stated, a "fair test" tests what is taught. Some courts call this an "opportunity to learn" (OTL), and sometimes, "curricular validity." See, classics Debra P. v. Turlington, cited above, and Northport v. Ambach (1982), aff'd (N.Y. Ct. App. 1983). And, more recently, GI Forum, et al. v. Texas Education Agency (W. D. Tex. 2000) and Rene v. Reed (IN Ct. App. 2001).

B. Notice requirement. Generally, 3-5 years advance notice to describe tests and graduation requirements.

Students are entitled to be notified of diploma and/or graduation requirements. See the 2001 Indiana Court of Appeals decision, Rene v. Reed, as well as the Texas district court decision, both cited above (GI Forum).

1 NOTE: Due process is not the right to a diploma. It is the right to adequate notice to
2 prepare to meet diploma requirements.

3 On related issues, recall that notice to parents and students is appropriate in other arenas
4 besides graduation requirements—even when no 14th Amendment interest is involved. See,
5 especially, new parental notice requirements of NCLB.

6
7 While high stakes tests involve Constitutionally protected property rights, promotion and
8 retention tests do not. See, e.g., Eric V. v. Causby (N.C. 1997). A preliminary injunction
9 was sought against the district's retention policy that was based on standardized test
10 scores (among other criteria). The district prevailed. The court applied the "rational
11 basis" test, finding (as have many courts) no Constitutional right to a promotion. In the
12 "balance-of-hardship test," the likelihood of harm to the students was low, especially as
13 remediation (more service!) was offered, and a waiver policy was in place. The likelihood of
14 harm to the district was high, as its reform efforts were on the line. Courts should not
15 substitute their judgment about the qualitative achievement standards for graduation.
16 One of the factors the court considered in finding for the retention policy was that the
17 district offered remedial services to students who were retained. See, Rene v. Reed,
18 above.

19
20 **No exclusion: All students to be included: in assessment or alternate assessment**

21
22 The NCLB and the IDEA require all students to be assessed for accountability purposes.
23 If accommodations are required, such must be provided. If a student is to be excluded
24 from the State or district-wide assessment, the Team must make that decision, and the
25 IEP must include a statement explaining **why** she will not participate and **how she will be**

1 assessed. Appropriate accommodations should be listed on the student's IEP or Section
2 504 plan. (See below for discussion about modifications, alternate assessments, and the
3 1% and 2 % caps).

4
5 *To assure access, does a test need to be validated separately for learning disabled*
6 *(or other specifically disabled) students or for any specific nationality group?*

7
8 No.

9 In a Georgia case, the OCR found no such requirement in statewide graduation tests. State
10 Dept. of Education (GA) (OCR 1987). In fact, to do so would invalidate the test. Recall
11 that the NCLB, IDEA and Section 504 require that tests be validated for their purpose.
12 See, e.g., 34 C.F.R. §104.35 (b)(1). See also OSEP's Letter to Copenhagen (OSEP 1995),
13 regarding Native American students.

14
15 And see the recent OCR letter, North Carolina Department of Public Instruction (OCR
16 2005). On the writing portion of North Carolina's test, which measured both writing
17 conventions and content, the OCR upheld the state's decision to not score test results
18 when taken with a scribe or through dictation the same as other results on the portion of
19 the test measuring writing conventions. The OCR reiterated the fact that tests must be
20 valid for the purpose used. The convention section of the test is designed to measure
21 student's skills in using the conventions of writing (spelling, grammar, etc.), which the state
22 asserted was an essential element of its instruction. The OCR did not order the state to
23 modify how its tests are administered and scored.

24
25 **Alternate assessments—the NCLB offers two types.**

- 26 • Alternate assessment for alternate achievement standards, if the state
27 allows this.
- 28 • Alternate assessment for academic content standards.
- 29

1 While the NCLB contemplates two types of alternate assessments, it does not require
2 states to develop alternate achievement assessments. South Dakota has developed these.
3 Pending IDEA regulations may clarify requirements. Stay tuned.

4
5 IEP Teams are to make determinations about assessments and alternate assessments. The
6 IDEA does not specify the form of alternate assessments, leaving that to states and
7 districts, and states have developed a variety of alternate assessment systems. Testing is
8 to be conducted for children in their age cohort group; that is, the same age group they
9 would be grouped with if they participated in regular education. **Bottom line:** No child is
10 exempt from assessments with or without accommodations, or from alternate
11 assessments.

12
13 **VI. Back to “appropriate accommodations” and modifications. These concepts**
14 **continue to confuse educators and parents, so let’s take another look!**

15
16
17 Let’s review the four elements of “appropriate accommodations” and modifications.

18
19 **1. Change**

20
21 A basic (but sometimes ignored) element. An adaptation changes the way students are
22 educated or tested. No 252’s here! Thus, districts may wish to rethink such
23 “accommodations” as “preferential seating” or “teacher will monitor Bill’s work.” Are they
24 really different? Do they need a 504 plan or IEP? Don’t teachers do that for all
25 students?

26 *Practice hint: Do parents know what the district offers to ALL students?*
27 *One suggestion: refer to concept of **universal design**. Architects have been using this.*
28 *Now educators need to, as well, according to both the NCLB and the IDEA.*

2. Necessary

Recall: Accommodations must be NECESSARY for the student to access his work and demonstrate what he knows and can do.

A recent case, Jefferson County School District R-1, 39 IDELR 119 (SEA CO 2003) includes a good discussion of the necessity requirement. The 16 years old student had dysgraphia and sought an at-home computer to help him with his homework. Ultimately, the hearing officer concluded that the request was a "want"--not a "need." That is, it was not necessary--the second prong.



Mobile County Board of Education (SEA AL 1997), involved the Alabama High School Exit Exam (Exit Exam), the state test required for a diploma. The plaintiff requested that the language and math portions be read to him. Evidence showed that the student had passed all subjects and never had a reading accommodation for any tests. Thus, the accommodation was not necessary—a key requirement!

The district prevailed. The hearing officer upheld Alabama's requirement that an accommodation needs to be used for at least a year to determine its efficacy and to keep the Exit Exam valid. Also noted was the fact that other diplomas are available to students who cannot meet the Exit Exam minimum requirements.

Practice hint: The issue of necessity is key in responding to late-day (9th, 10th, 11th grade?) requests for extended time on college entrance tests.

Several developments of interest to school personnel and parents about requests for extended time on the SATs or ACTs include:

Letter to Moore (OSEP 2002).

The IDEA requires schools to include transition services, which are intended to prepare a student for life after high school. A district's obligation to the student ends when he/she graduates with a regular diploma. Whether a post secondary school provides academic accommodations does not depend on high school evaluations or IEPs. Parents have right to request evaluations to determine a child's eligibility under the IDEA but if they want additional testing for reasons other than continued eligibility (such as admission to college), the LEAs are not obligated to do that. Parents can, of course, appeal the denial of that request. It's that tennis match!

And see Fenton Area Public Schools (SEA MI 2005), where the hearing officer explained that ordering accommodations on the ACT "were not within her jurisdiction."

Montgomery County Public Schools (SEA MD 2003).

Parents appealed the district's refusal to assess a senior so he could take the SAT with extended time. The district prevailed. The ALJ explained, "A major life activity envisioned in section 504 does not include attaining an SAT score sufficient to gain admission to college, with or without an academic or athletic scholarship." Test taking was not found to be a Section 504 "major life activity."

Westport Board of Education (SEA CT 2003).

High school student with depression, anxiety disorder and ADD was not entitled to additional time on tests. Although the anxiety interfered with her academic performance, her disabilities did not substantially limit her major life activities of learning or test

1 taking. The student did at least as well as the average high school student. No 504
2 eligibility.

3
4 Massachusetts DOE Administrative Advisory SPED 2004-3: College Testing Information,
5 January 28, 2004. www.doe.mass.edu/sped/advisories/04_3.html.
6

7 The state advised its LEAs that they do not need to update tests or provide additional
8 assessments as requested by parents or the College Board (CB) to support a request for
9 accommodations on CB exams. If a student requests evaluations to attain accommodations
10 on college entrance tests and the district has no basis to believe that he is eligible for
11 services, the district need not do that testing, and needs to notify the parents of its
12 decision. They can appeal the district's decision.

13
14 Next, to determine necessity, be sure that the accommodation responds to the specific
15 disability. There should be a 1:1 correspondence between disability and need. Thus, large
16 print books may not be responsive to a student with ADHD, or extra time may not be
17 responsive to a student with organizational issues.

18
19 In Calallen Independent School District (SEA TX 1997), the student was removed for pre-
20 AP biology because of a failing grade. She did not demonstrate how her disability [focal
21 dystonia ("writers' cramp")] affected the IEP's implementation, or how extra time was a
22 relevant accommodation to the disability. No violation found.

23
24 And see, Hopewell (PA) Area School District (OCR 1997), and Northeast (TX)
25 Independent School District (OCR 1995), where no accommodation was ordered for
26 student because there was no showing that the requested accommodation was related to
27 the disability.

1 *Side effects. IEP Teams should begin to focus on these!* An accommodation may, in
2 fact, be contra-indicated. View it like the medicine side effects about which we are
3 warned. See, Axelrod v. Phillips Academy (Dist. Ct. MA 1999), for an interesting
4 discussion of the side effects of "extra time" for a student with ADHD.

5 *...[T]he court accepts the testimony of Dr. Klein that giving an extension to a*
6 *person who procrastinates is not an effective solution because the problem is not*
7 *that the student needs more time--rather, it is that he is not organizing his time.*
8 *Giving such student more time is akin to giving somebody who is chronically late for*
9 *appointments a later appointment--that person would still be late for his later*
10 *appointment.*
11
12

13 See, The Special Educator, June 13, 2003, for a discussion of the unintended
14 consequences caused by the overuse of paraprofessionals.
15

16 And, Fisher v. Board of Education of Christina School District (Del. 2004) where a district
17 argued that the student with learning disabilities, now aged 15, had passed his courses and
18 received a FAPE. The student was in an inclusion setting and received many
19 accommodations on tests, including rereading instructions, extending time, allowing him to
20 complete the test over several sessions, reading test passages to him, and providing him
21 with a tape recorder or a test administrator to record his answers. The court found that
22 the "passing" scores did not demonstrate that he had progressed in the basic components
23 of reading. "His 'progress' in areas such as spelling and writing was more a function of the
24 School District's accommodations than any real improvement in mastering the subject."
25

26 The court found the inclusion inappropriate and ordered the district to fund two years of
27 private school as compensatory services.

1 And see, the 2005 3d Circuit Court of Appeals decision, Montgomery Township Board of
2 Education about a fourth-grader who was unilaterally placed in a private school. The
3 district argued that its IEP was appropriate, and that the student had made progress, as
4 evidenced by his passing grades. The Court was not persuaded:

5 *The District Court did not err in finding that D.C.'s paper record, which derived*
6 *from his performance in a setting very like that proposed in the District's IEP,*
7 *overstated his actual progress. There is evidence that, in order to boost D.C.'s*
8 *self-esteem, his previous grades were based largely on his effort, rather than his*
9 *achievements, except in mathematics, an area in which he performs well. D.C.'s*
10 *third-grade teacher also allowed a high degree of informal accommodation of his*
11 *disabilities, in the form of substantial assistance by his parents (amounting, at*
12 *times to outright completion by them of their child's assignments), as well as extra*
13 *time to complete assignments. D.C.'s "successful" completion of classroom tasks*
14 *does not appear probative of a "meaningful educational benefit," under the*
15 *circumstances. Similarly, D.C.'s scores on standardized tests, while often within*
16 *average ranges, do not appear to correspond to his day-to-day academic*
17 *performance, and are not inconsistent with the District Court's finding that D.C.*
18 *needed more assistance than the Board's IEP provided to achieve significant*
19 *learning.*
20

21 Sherman and Nishanian v. Mamaroneck Union Free School District (2nd Cir. 2003).

22
23 The parents of an 11th grader with a learning disability in math claimed their son needed an
24 advanced calculator to pass the math class. Instead, the district provided an earlier model
25 for the student which he had been using.

26
27 The court held for the district. The older model required the student to work through
28 the problems...If an advanced piece of equipment thwarts the learning process while the
29 student receives aids that develop skills, it will not be appropriate for a FAPE.

30
31 *If a school district simply provided the assistive devices requested, even if*
32 *unnneeded, and awarded passing grades, it would in fact deny the appropriate*
33 *educational benefits the IDEA requires.*
34

35 Cautionary tales, indeed. The LRE MUST PROVIDE A MEANINGFUL BENEFIT!

1 Compare with several recent cases, where grades and passing tests by students was used
2 as evidence of a FAPE, and, in one case, as evidence for declassifying the student. Polk
3 County Board of Education (SEA FL 2004); Goliad Independent School District (SEA TX
4 2004); Fayette County Board of Education (S.C. KY 2005); Board of Education of
5 Oceanside Union Free School District (SEA NY 2004).

6 7 **3. Access/opportunity**

8 Recall: the purpose of accommodations is to provide access (equal opportunity) to
9 programs and tests. It's about input--not output or outcomes. It's not about closing gaps
10 among students, or having all cross the bar--it's about providing all with the opportunity to
11 learn and to demonstrate their knowledge and skills. See Wythe County (VA) and
12 Sherman v. Mamaroneck, cases that deal with a meaningful opportunity to learn.

13 14 **4. Fundamental alteration or not?**

15
16 If **yes**, it's a modification; if **no**, it's an accommodation.

17
18 See, Brookhart again:

19
20 *Altering the content of the [test] to accommodate an individual's inability to learn*
21 *the tested material because of his handicap would be 'substantial modification' as*
22 *well as a 'perversion' of the diploma requirement. A student who is unable to learn*
23 ***because of his handicap** is surely not an individual who is qualified in spite of his*
24 *handicap.*
25

26 **The goal is to level the playing field, not to change the game or substantially/**
27 **fundamentally alter the field.** While it may appear harsh, the goal of accommodations is
28 not to guarantee results or outcomes. See again, Section 504; 34 C.F.R. §104.4 (2).

1 **KEY:** It is not the student's ability, knowledge, or skill that determines the
2 accommodation. It is his need for an accommodation so he can
3 demonstrate what he knows and can do in the domains taught and
4 tested.

5
6 **# 5 Getting it!**



7
8
9 **J. What's the difference between leveling the playing field and changing**
10 **the game?**
11

12
13 **Who decides if it's an accommodation or a modification?**

14 The short answer is--the "test maker" decides how a test is to be administered. In some
15 cases, that is analogous to the teacher. In all cases, it is the standard-setter. The IEP or
16 Section 504 Team determines how a student will take a test, upon training by the SEA,
17 LEA, test maker, teacher, etc., about accommodations or modifications. SEA's and LEA's
18 are to provide information to districts, and regular education teachers are members of
19 the Team.

20 ***.....and this is why it's so important to have the regular education teacher at the***
21 ***Team meeting...***
22

23 OSERS and Office of Elementary and Secondary Education (OESE) have cautioned
24 educators about this challenge. The January 2001 Memorandum to Chief State School
25 Officers on the IEP Teams' role, includes the following:

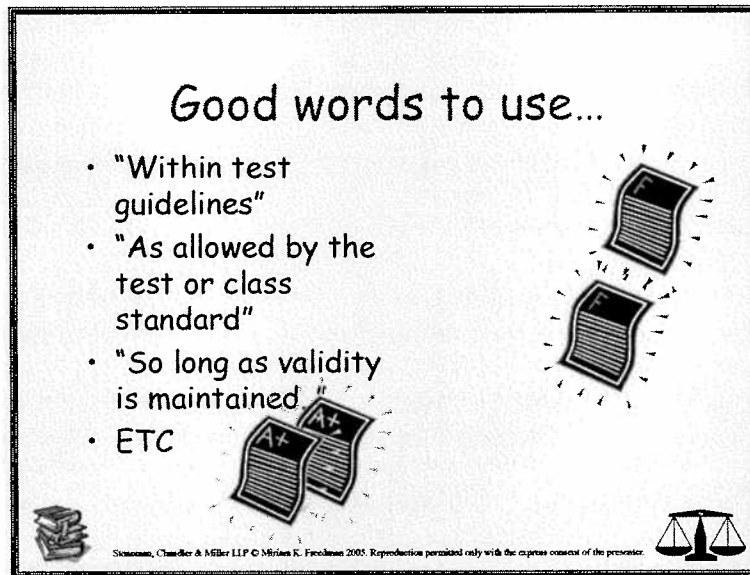
1 ...neither the SEA nor the LEA can limit the authority of the IEP team to select
2 individual accommodations and modifications in administration needed for a child
3 with a disability to participate in State and district-wide assessment of student
4 achievement. However, the SEA or LEA must ensure that their assessments are
5 valid, reliable, and consistent with professional and technical standards, particularly
6 for assessments that will have important consequences for the student or the
7 school. 34 IDELR ¶293 (OSERS/OESE 2001), clarifying an earlier Memorandum.
8

9 In the above-cited Memorandum the words "accommodations" and "modifications" mean
10 "adaptations." And see, Letter to Gloeckler, 103 LRP 49608 (OSERS 2003).

11
12 Remember! Judgments are based on the test maker's (regular educator's, etc.) directions
13 for a specific test, assignment, standard, etc. —not on the types of accommodations, per
14 se. Make decisions on a case-by-case basis! While many states include this directive to
15 IEP and 504 Teams, alas, some do not.

16
17 This presenter believes that attempts to make generic lists of accommodations or
18 modifications have confused practitioners and are inconsistent with the requirements to
19 determine what is appropriate in any given situation. See, discussion on this issue in The
20 Special Educator, March 21, 2003.

21
22 For example, in Prince George's County (MD) Public Schools (OCR 2000), the OCR upheld
23 the use of accommodations in the state's writing test (including a DynaVox and a scribe,
24 among others), because it was informed by the Maryland DOE "that the accommodations
25 met the requirements of a valid assessment for the Maryland Writing Test." But in Los
26 Angeles Unified School District (SEA CA 2000), similar adaptations were not allowed.
27 That's exactly how it's supposed to work—on a test-by-test and, in school, a class-by-class
28 basis. Toward that end, here are some IEP or 504 words that may be useful.



CONFUSING? Yes! Adding to confusion is that some commentators have opined that accommodations deal with test *format* and other *procedures*, and modifications deal with *content*. THAT IS NOT ALWAYS SO. Is extra time an accommodation always? NO. It depends on WHAT is tested! It's all about the WHAT! Making such distinctions tries to systematize what can't be systematized because it is test- and case specific. In this presenter's view, one cannot know whether a **change** is an accommodation or a modification without knowing the situation at hand. Remember the request for extra time on a timed typing test. Ann Arbor (MI) Public School District (OCR 1998). Extra time was a modification there.

See, an important First Circuit Court of Appeals case (actually, two decisions), which dealt with the issue of the multiple choice test *format*!

Can the test format itself involve a modification? For example, does a school have to provide a test format other than written "multiple choice"?

The Court found that the *test format* can -by *itself*—was so central to the purpose of the test that to change it would modify the test. And the Court did not order that! Wynne v.

1 Tufts University School of Medicine (1st Cir. 1991); Rehearing en banc, (1st Cir. 1992).
2 Wynne involves a medical student's use of the written "multiple choice" test format in
3 biochemistry and the issue of whether that format was a fundamental element of Tuft's
4 test. If so, no accommodation was reasonable. If not, then an alternate format should,
5 presumably, have been provided for the student.

6
7 The case had a long saga--going to the First Circuit Court of Appeals twice! After Wynne
8 reached the court the first time, it remanded the case to determine if Tufts had met its
9 burden:

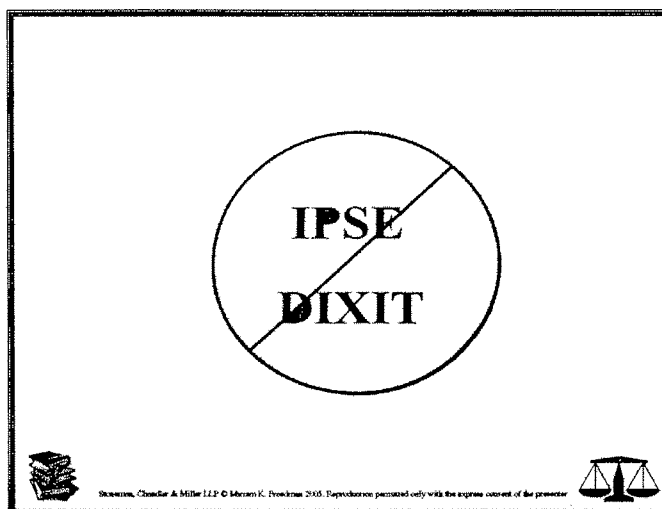
10 *of demonstrating that its determination that no reasonable way existed to*
11 *accommodate [the student's] inability to perform adequately on written multiple-*
12 *choice examinations was a reasoned, professional academic judgment, not a mere*
13 *ipse dixit.*
14

15 The university was invited back to demonstrate the availability of reasonable
16 accommodations, as follows:

17 *If the institution submits undisputed facts demonstrating that the relevant*
18 *officials within the institution considered alternative means, their feasibility, cost*
19 *and effect on the academic program, and came to a rationally justifiable conclusion*
20 *that the available alternatives would result either in lowering academic standards*
21 *or requiring substantial program alteration, the court could rule as a matter of law*
22 *that the institution had met its duty of seeking reasonable accommodation.*
23

24 After the medical school submitted six additional affidavits, the court held that it had
25 met its burden. This case highlights and confirms several key practical nuggets:

- 26 1. Courts and the OCR generally defer to institutional decision makers who
27 consider requests for accommodations in a reasoned, professional manner
28 and make conclusions in a rationally justifiable way ("demythologize" it).
29
- 30 2. In order to accommodate a disabled student, an educational institution has
31 no obligation to lower its standards or fundamentally alter its program.
32
- 33 3. A school district need not be "right" in its program-related decisions, so
34 long as it makes "a professional, academic judgment about the availability of
35 reasonable accommodations. A school cannot rely on ipse dixit--a bit of
36 Latin with 21st Century import.



Ipse dixit means an assertion that is made but not proven; as in, we've always done it this way, or do it because "I say so." Instead, district personnel may be required to provide a reasoned, professional judgment.

VII. Now, to specific legal requirements for grades and report cards

A. Districts and states set standards

Legally, what is the best-taught course in America?¹¹ See, Axelrod v. Phillips Academy, for a clear discussion of Section 504/ADA requirements and standard setting in the private school setting. And see, a 2003 valedictorian case, Hornstine v. Moorestown (D.C. NJ 2003) which--for purposes of this presentation--revealed the district's failure to have clear standards before issues arose.

¹¹ Admittedly, it's been many years since we were in school. Yet, we remember the standard for gym. Wherever and whenever we went to school, what were the three requirements? As will be discussed, this is the "best taught course in America--legally." In Brevard County (FL) School District (OCR 1995), a student failed gym, alleging that due to dyslexia she was unable open her locker and failed. Not so, ruled OCR, which found that she failed gym due to her lack of participation.

1 Los Angeles Unified School District (OCR 2005). Interesting case. The OCR upheld the
2 district's requirement that the high school student needed to complete an extra
3 prerequisite in order to participate in the internship program. No Section 504 violation
4 found.

5 *Practice hint: First, know what the WHAT is! Then what the WHO is.*

6
7 *Practice hint: Think coffee at coffee shops--small, medium, large. They have standards!*



8
9 Issues about grading arise at all levels of education: elementary, secondary, college, and
10 professional schools. For public school programs, see, a helpful OCR letter, Letter to
11 Runkel, 25 IDELR 387 (OCR 1996). It provides guidance in a question and answer format,
12 and will be discussed extensively.

13 14 **B. Regular courses and regular grades**

15
16 The assumption for all children in public schools--in grading (as well as programming) is
17 that they are to meet regular education requirements and standards. If that assumption
18 is not to apply to a specific child, the child's IEP Team must so state, and
19 provide reasons on the IEP. No "informal" grade modifications should be made outside the
20 Team process. See again, Montgomery Township Board of Education (3rd. Cir. 2005). Also,
21 in this presenter's opinion, use of Section 504 plans in this arena is problematic. See
22 Dade County (FL) School District (OCR 1998), for a case about grading policies concerning

1 non-academic standards, such as attendance. OCR upheld the district's standards, finding
2 them based on objective, nondiscriminatory factors.

3
4 On the flip side, be wary of "grade inflation" for children on IEPs and Section 504 Plans
5 and informal grading policies which do not provide parents with notice that the student
6 was graded according to a different standard from that which is used in the regular
7 classroom. Carl D. v. Special School District (MO 1998) ("There was no evidence to
8 support the parents' assertion that the student's grades were inflated."); Brett v. Goshen
9 Community School Corporation (D.C. 2001).

10 *Brett earned a bona fide diploma... There is no evidence that his graduation was a*
11 *sham... Brett... offered no proof that he did not earn the required number of credits*
12 *or that his teachers gave him better grades than he deserved, or that he gained*
13 *far less knowledge than his peers. And there was no evidence to support the*
14 *contention that Defendants graduated him to get rid of him").*

15
16 South LaPorte County Special Educational Cooperative (IN 2000).

17 *But, what if there were such evidence?* See Fisher and Montgomery Township,
18 discussed above, among other cases. And see Barnett v. Memphis (6th Cir. 2004) for a
19 decision finding that the student made only *de minimis* progress, and thus was denied a
20 FAPE.

21 *Remember, "gifts" are for birthdays—not report cards!*

22 23 C. Modified courses and grades

24
25 **KEY:** It's the WORK (expectations, standards, etc.) that's modified!

26
27
28 *Can a report card indicate that the grades for the student are modified?*

29
30 Yes, if determinations are made on an individualized basis and special education students
31 are not excluded from regular grades on a categorical basis. Determinations for children
32 must be made at IEP Team meetings and included in the IEP.

1 School districts may not modify grades on the basis of a student's special education
2 status alone. To do so raises "a strong inference that children with disabilities, who
3 usually are the students classified as "special education students" are being treated
4 differently on the basis of their disabilities." Runkel. And, if modified grades exist
5 across the spectrum--from remedial to honors--such grading systems are more likely to
6 pass OCR muster.

7 ***Remember: it's the continuum that is so important!***

8
9 ***Can a district request that a student not participate in class where level is too hard***
10 ***for the student--even with in-class support, tutorials, and individualized instruction?***

11
12 Yes, and here's how one district did it so well!

13
14 Middlesex Borough Board of Education (SEA NJ 2003).

15 The parents of a student with specific learning disability wanted her enrolled in college
16 prep chemistry, but the district sought to have her transfer to basic chemistry. The
17 district prevailed.

18
19 School personnel testified that student was overwhelmed in class and did not have
20 requisite background in math. Parents and student insisted that she remain--and be
21 provided with additional modifications and tutoring. **Such were provided** but student
22 continued to fail college prep chemistry. The hearing officer found that she did not
23 receive a FAPE and that she "simply does not have the educational background" to benefit
24 from college prep chemistry. He dismissed the parents' claim. And see, Cheltenham (PA)
25 Township School District (OCR 2004), where the OCR found no unlawful discrimination
26 when the district moved the student to a lower level course.

Report cards can cite *modified* courses—not *accommodated* coursework. Why? Because accommodations do not affect the standards--and are no one's business!

Centerville (OH) School District (OCR 2003).

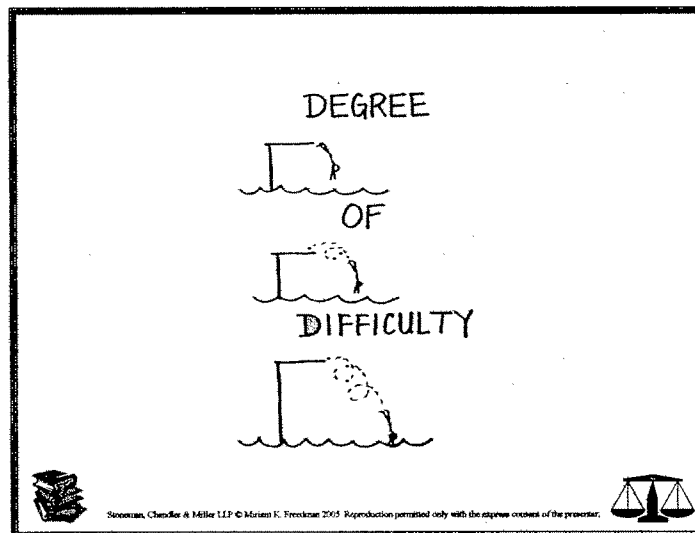
Under Section 504, a school district should not utilize a separate, different, or modified grading system for students with disabilities enrolled in regular education classes unless it has been determined that the subject matter or curriculum expected to be learned is fundamentally different (sic) than that for students without disabilities enrolled in the class. (Emphasis added).

Thus, modified grades are allowed only if the work is fundamentally different from the regular course standards or requirements.

D. Weighted grades

KEY: As in the Olympics, it's the "level of difficulty."

That is, how hard is the work? Not how hard is it for me? It's the objective--not subjective standard.



Weighted grades, too, can pass muster if appropriate determinations are made. They must be based on a legitimate educational decision, which takes into account the differences in the method of instruction and in the quantity of material covered by different classes.

1 *And remember, it's the objective standard—not the subjective one—which counts. It's*
2 *not how hard the dive is for ME; it's how hard the dive is. Period.*

3
4 An OCR letter, Northeast (TX) Independent School District (OCR 1995), provides some
5 guidance about weighted grades that are used to reflect different academic levels in
6 coursework. The OCR found no violation where a district awarded students in "basic" and
7 "special education" classes less academic credit than students who took "regular" courses
8 in the same subject because the weighting was based on legitimate educational factors,
9 including the difficulty of the work, the material covered, etc. Also, each student's
10 placement in classes was based on his/her individual needs, as determined by the IEP
11 Team, and the district enrolled students with IEPs in all types of classes in the district,
12 **spanning the entire spectrum of offerings.**

13
14 The OCR summarized requirements for weighted grades for class ranking, honor roll,
15 college application, etc. in the above-cited Letter to Runkel.

16
17 A grading system that arbitrarily assigns lower grade weighting to a special education
18 course would violate Section 504. Remember divers at the Olympics with the "degree of
19 difficulty" classifications. So, too, here.

20
21 See, Metropolitan (TN) Public School District (OCR, 1991), for a well-developed
22 grading/promotion/retention policy that included a non-discriminatory coding of students'
23 courses and allowed the students to make choices about their grades after the courses
24 started.

As in Wynne, each district/school/teacher should establish standards and grading procedures. The OCR and the courts have approved many different schemes. There is no one "right" way. Sometimes, the teacher, school, or district may be called upon to explain these issues with reasoned, professional judgment--without ipse dixit.

Corning (NY) Painted Post School District (OCR 1997). The OCR found that the student's grades were lowered because he did not do homework (not because of his disability). OCR investigators spoke with the student's four core academic teachers, each of whom used a different grading system in his/her class. No violation found.

To make a grading policy, a school/district should:

1. Establish standards that are based on objective criteria or other educational justification
2. Create clear uncomplicated standards that are "fair and simple to understand"
3. Notify all!
4. Implement consistently
5. Remember—it's not rocket science
6. Remember—Courts defer to educators who do the above
7. Keep smiling!

Once standards are set, does the refusal by a district or state to make specific accommodations on a test mean there is per se discrimination?

It depends on how that is done. Schools need to make determinations based on the

WHAT first. In Rene v. Reed, the Indiana Court of Appeals wrote:

We cannot say the trial court erred to the extent it determined the State need not honor certain accommodations called for the Students' IEPs where those accommodations would affect the validity of the test results.

1 See the recent 2005 OCR Letter upholding the writing portion of North Carolina's tests.
2 The OCR did not order the state to modify its standards and found that they did NOT
3 unlawfully discriminate against SWD. And...

4
5 In Los Angeles Unified School District, cited above, the hearing officer upheld the
6 district's refusal to allow certain accommodations on the WRITE: Sr. Writing Test, which
7 were not approved as accommodations.

8
9 In Nevada State Department of Education (OCR 1996), the OCR upheld the state's (SEA)
10 ban on the use of calculators in the math portion of the proficiency exam. The OCR found
11 that the SEA's decision to test basic math computation was an **essential part** of its
12 educational program. Allowing calculators would constitute a **fundamental alteration--**
13 which, by definition, is not a **reasonable accommodation** and not required. The SEA had
14 made other reasonable accommodations for SWD. See also, Ann Arbor (MI) Public School
15 District, above, where the OCR approved the refusal to allow extra time on a keyboarding
16 skills test. Providing extra time would have defeated the test's stated purpose.

17
18 In Florida State Department of Education (OCR 1998), the OCR found the guidelines for
19 administering Florida's competency test specified which accommodations could be made.
20 These did not include reading or explaining test items to students. While the student's
21 IEP permitted these accommodations in his schoolwork, the IEP specified that
22 accommodations on the state test would be provided "***within test guidelines.***" This state
23 test, they were not permitted, as they would invalidate the test. No discrimination or
24 violation was found. **Excellent language for an IEP!**¹²

¹² Thus, the College Board and the ACT's decisions to stop flagging SAT and ACT scores are troubling because they contradict long-standing testing requirements. See discussion in "Disabling the SAT," by presenter Miriam Kurtzig Freedman, at her website: www.schoollawpro.com.

1 See, Virginia Department of Education (OCR 1997) and the above-cited recent Rene v.
2 Reed, where some accommodations which would invalidate the test were not allowed, in
3 spite of the fact that they were on the student(s) IEPs. See, Letter to Gloeckler,
4 where OSEP opines that for NCLB purposes, if a student takes a test with invalidating
5 modifications, the test will not count at all.

6 *Practice hint: The LEA needs to advise IEP teams to conform their accommodations to*
7 *the SEA test requirements. Otherwise, they will set up a Hobson's choice situation for all.*

8
9 This is the PYRAMID OF LAWS at work!
10

11 See, Ann Arbor, where the OCR cited the district's failure to reconvene the Team when
12 faced with that situation. "This dispute regarding what grading system to use should have
13 been resolved through the IEPC meeting with attendant procedural safeguards."
14

15 IEPs and 504 Plans: Which to use when?

16 Accommodations may be considered at the IEP Team or 504 meeting and set forth on IEPs
17 or 504 Plans. To this presenter, it appears to be good practice to consider appropriate
18 accommodations (and modifications or alternate assessments) at IEP Team meetings--not
19 504 meetings. 504 meetings can consider accommodations only. WHY? IEPs provide the
20 requisite due process protections, particularly when high stakes assessments are involved.
21 504 plans accommodate to the general curriculum—not a modified curriculum.
22

23 E. Requirement for individualized decision-making...by EXPERTS!

24 School Board of Nassau County v. Arline (U.S. 1987). The seminal case. This 1987
25 Supreme Court decision involved a medical (not educational) issue. Was the teacher, who
26 suffered from tuberculosis, entitled to return to work under Section 504? And were

1 there "reasonable accommodations" for her? The Court rejected the per se evidence that
2 she was unqualified because she had a disability.

3
4 The Court held that such decisions be made on an individualized basis, not on the basis of a
5 disability category. Reasonable medical judgments must be used to decide whether
6 accommodations would impose "undue financial and administrative burdens" or require "a
7 fundamental alteration in the nature of [the] program." With reasonable medical
8 judgment, courts should defer to the judgment of public health officials.



9
10 **So, too, in education. Always remember who the experts are. And that great Picasso**
11 **story! In Arline, the Court relied on medical experts; in education, courts rely on**
12 **educators! Honor the real "EXPERTS"—your staff!**

13
14 **EXPERTS—That's U!. Do not forget that they (not parents or outside evaluators)**
15 **select the appropriate methodology(ies) for the child to receive a FAPE, and, since**
16 **2004 IDEA and 2002 NCLB, use *research-based instruction*, etc. The district's**
17 **EXPERTS include any consultants whom you hire to help your staff become even more**
18 **expert.**

19
20 ***What flows from this?***

- 21
- 22 • Do your teachers know they are the experts? Do you tell them by word and deed?
 - 23
 - 24 • Do they act like experts? Do you help them to do so? Do they know the courts and
 - 25 hearing officers are listening to them?
 - 26
 - 27 • Can they pass the "birthday party" test? Or the lunch table test? Very KEY tests,
 - 28 indeed.

- 1 • Do they know the idiom: "nature abhors a vacuum?" In the laws of nature, empty
2 spaces are unnatural. So, too, here. Some force will fill the space!
- 3
- 4 • Do they limit their participation to their areas of expertise?
- 5
- 6 • Do they recommend what the child needs—not what the parents seek or what is
7 available?
- 8

9 T. B. and E. B. v. Warwick School Committee, et al. (1st Cir. 2004).

10 Parents lose a methodology challenge in a case about a seven-year-old child with autism.

11 The Court relied on the expertise of school personnel. The district argued successfully

12 that it had enough information about the child who had recently moved to Rhode Island

13 and was diagnosed with autism--to propose an interim IEP and decide HOW to educate

14 the child; i.e., the methodology to use. It decided to utilize the TEACCH method, not the

15 parents' DTT. The First Circuit found that the district had *"well-trained teaching staff*

16 *and track record of success."*

17

18 DOCUMENT! DOCUMENT! How did the Court know there was a record of success?

19

20

21 Watson v. Kingston City School District (2nd Cir. 2005).

22 The Court upheld the district's IEP, which used a "comprehensive multi-sensory approach"

23 for a student with a learning disability and rejected the parents' evaluators'

24 recommendation for a private school, using Orton-Gillingham.

25

26 *The mere fact that a separately hired expert has recommended different programming does*
27 *nothing to change this, as deference is paid to the District, not a third party.*

28

29 Heather S. v. Wisconsin (7th Cir. 1997).

30

31 *We note that the deference [cited in Rowley] is to trained educators, not necessarily*
32 *psychologists. While the latter certainly have a role to play, and can contribute meaningful*
33 *insight to the evaluation of a student, the school district is required to bring a variety*
34 *of persons familiar with the child's needs to an IEP meeting, including, specifically, teachers.*

1 Remember the "I" in IEP! Categorical decisions are out—individualized decisions are in.
2 Should a reader be provided? That depends on the test's purpose, the child's disability
3 the accommodations that may be reasonable, etc. Hawaii State Department of Education
4 (Oct. 1990).

5 F. Full implementation of IEPs and 504 plans

6 A word must be again said about the federal contract concept. See, Doe v. Withers.
7 Citation, above; also, Vail (AZ) Unified School District No. 20 (OCR 2000); Ysleta
8 Independent School District (SEA TX 2000); Lafourche Parish (LA) Public Schools (OCR
9 2000); Sweetwater (CA) Union High School District (SEA CA 2000); Greenville County
10 (SC) School District (SEA SC 2000), among many other relevant cases. Full
11 implementation is key.

12 VIII. Transcripts

13 Confidentiality rights, as per Family Educational Rights and Privacy Act (FERPA), are
14 closely linked to issues about transcripts. See, Regulations at 300.560 through 577. In
15 short, SWD have confidentiality rights regarding their disabilities, including the very fact
16 that they are disabled.
17
18

19
20 A transcript may not identify a student with a disability because, again, that would classify
21 the student on the basis of disability and deny his or her right the right to not reveal the
22 disability status. "This is an emphatic no" according to the OCR in Letter to Runkel.

23
24 The OCR cautions--there are no "definitive standards enunciated in any court or OCR
25 decision" for how districts can provide information on transcripts. Transcripts may
26 identify special education classes if terms such as "basic, level I, practical," and so forth,
27 are used, instead of "special education." Terms such as "learning center," "home-bound

instruction," "resource room," or "requirement waived-medical" should probably be avoided.

However, since these terms may also be used for "at-risk" students who are not disabled, and have different meanings in different localities, they could pass muster. Local definitions apply. Can a district use asterisks, or terms such as "independent study," "individualized learner objectives," or "modified course?" Probably, especially if descriptors are used for the entire spectrum of students and courses to note changes from the regular grading system. See Ann Arbor, cited above.

The OCR allowed the term "Independent Learning Center (ILC)" because of different content between those and regular education classes. This was so even though ILC classes are attended by special education students only. The OCR noted that the district uses terms such as AC for accelerated and AP for advanced placement courses, demonstrating a continuum of options.

<u>OK to use</u>	<u>Not OK words May be "suspect"</u>
"Basic math"	"Resource Math"
"Level I English"	"Special education English"
"Modified curriculum"	"Modified by IEP goals"
"I.S." Independent study—especially when used as part of continuum	"HB"—homebound
"Essential English"	"Peer facilitation used"
"Fundamental English"	"LC Learning center math"
"Functional English"	"Inclusion math"
"Practical math applications"	
"Essentials of..."	

Besides appropriate language, remember the continuum. It is key.

1 **IX. Honors, gifted and talented programs, and the honor roll**

2
3 The same principles apply to questions of honors, such as National Honor Society (NHS)
4 and the honor roll.

5 **First, set standards.**

6 **Then, make decisions on an individualized basis.**

7 Districts may not exclude identified students from honor roll or NHS recognition on the
8 basis of their IEP or Section 504 status. The OCR struck one grading system in which
9 students on IEPs received "ability/effort" grades, while others received letter grades, as
10 "categorical" decision-making. Fort Smith (AR) Public Schools (OCR 1993).

11
12 But see, Arlington (TX) Independent School District (OCR 1997), where students in a
13 specific program were provided opportunity to be included in honor roll like their non-
14 disabled peers. Perry (OH) Public School District (OCR 2003), another dispute about the
15 NHS for a student with juvenile diabetes. The OCR found that her application was
16 rejected because she did not meet standards. And recently, the OCR ruled for a Texas
17 district, Humble (TX) Independent School District (OCR 2005), which did not induct a
18 student into the NHS because she did not have a 4.0 average in level and above-level
19 courses. Her 4.0 average was in modified courses—which did not meet NHS requirements.

20
21 Students with IEPs must be provided with the opportunity to participate in courses at all
22 levels for which they are qualified or meet course prerequisites (if any). However, they,
23 like other students, can be held to the same standards.

24
25 Finally, "degree of difficulty" decision-making is non-discriminatory. See, Saddleback
26 Valley (CA) Unified School District (OCR 1997), where a student did not meet the level

1 required for the award, and denial of award did not violate Section 504. SWD should have
2 an opportunity to compete with others, even though standards for educationally sound
3 reasons may mean that some SWD will not be able to perform at those levels. Simply
4 because standards (academic or non-academic) may exclude certain identified students
5 does not make them discriminatory. Again, the purpose of the laws is to provide equal
6 opportunity, not equal (or specific) outcome.

7
8 See, Prince William County (VA) School Division (OCR 1996), where a district's honor roll
9 policy was upheld by the OCR, in spite of the fact that it required students to perform on
10 grade level and meet grade level expectations. While that requirement would preclude
11 some SWD, because of their disability, the policy was not violative of Section 504 because
12 it was based on valid educational standards and "neutral on its face." The OCR Letter of
13 Finding illustrates that old "because of" versus "in spite of" fulcrum.

14
15 **Gifted/talented programming.** Monterey (CA) Peninsula Unified School District (OCR
16 2002). The district was accused of discriminating against a student with autism when it
17 did not place him in the GATE program, the district's gifted and talented program. The
18 parent alleged that the student's high math scores on a test qualified him, but the OCR
19 found that the district's procedures for determining eligibility were not discriminatory.
20 While the student had been considered, he did not qualify for the GATE program. And
21 see Palatine (IL) Community Consolidated School District # 15 (OCR 2004), where the OCR
22 found the district's refusal to admit the student to the Gifted and Talented Program was
23 based on the student's age and not a discriminatory standard.

24
25 *Alas, we now have litigation on "Who is the valedictorian." Or, "Shall we have zero,*
26 *one, two, or three... valedictorians?"*

1 In the spring of 2003, the press widely covered a case in Moorestown, New Jersey,
2 Hornstine v. Moorestown, cited above. It highlights the need to set clear criteria BEFORE
3 students "walk."

4
5 X. Transition planning A BIG issue—worthy of its own seminar.....
6

7 Issues of transition planning and implementation are generally beyond the scope of this
8 presentation. Note the new requirement in the IDEA 2004, including the new requirement
9 for an exit report.

Transition planning...

- Beginning in IEP year of 16th birthday
- Appropriate measureable postsecondary goals based upon age appropriate transition assessments related to training, education, employment, and, where appropriate, independent living skills
- To assist child in reaching those goals



Stoetman, Chandler & Miller LLP © Miriam K. Freedman 2005. Reproduction permitted only with the express consent of the presenter.



Transition Services

- Prepare for "further education," employment and independent living
- "Results-oriented" process
- Improving academic and functional achievement
- Based on child's needs, taking into consideration his/her "strengths," preferences, and interests
- And, that "summary of performance...."



Stonerman, Chaudler & Miller LLP © Miriam K. Freedman 2005. Reproduction permitted only with the express consent of the presenter.



1

AND...

- While no evaluation is needed before a student graduates with a regular diploma or "ages out" of the IDEA...**NEW!**
- **SUMMARY OF PERFORMANCE...** LEA to provide "summary of the child's **academic achievement and functional performance**, which shall include recommendations on how to assist the child in meeting the child's post secondary goals."



Stonerman, Chaudler & Miller LLP © Miriam K. Freedman 2005. Reproduction permitted only with the express consent of the presenter.



2

A few cases as examples. The grand daddy of such cases may be Yankton School District v. Schramm (8th Cir. 1996), where the 8th Circuit Court of Appeals held that the district's discontinuation of IEP services (arguing that the student's needs were only physical) was inappropriate for a student who needed transition services. The Court rejected the

1 district's argument that the student was entitled only to Section 504 services. South
2 Dakota is in the 8th Circuit!

3 See, Mason City Community School District (IA 1994), where a 19-year-old's graduation
4 was not allowed by the administrative law judge. The student had not completed an
5 appropriate educational plan and the district's transition planning had not adequately
6 prepared her to adapt from school to adult life.

7
8 And see, Livermore Valley Joint Unified School District (SEA CA 2000), where the hearing
9 officer rescinded the student's diploma because transition planning and services, in
10 accordance with the IEP, were not completed. As well, compensatory services were
11 ordered! Another cautionary tale!

12
13 See, also, Daugherty v. Hamilton County Schools (D.C. E. TN. 1997), where a student sought
14 (unsuccessfully) to obtain compensatory services following his high school graduation. See,
15 also, by way of example, Hamilton County School (SEA TN 1996); Bret Harte Union High
16 School District (SEA CA 1999); Lancaster Independent School District(SEA TX 1998);
17 Board of Education of the Wappingers Falls Central School District (SEA NY 2005)
18 (Educational evaluation and transition services "would not provide appropriate relief." Not
19 ordered). This is a growing area of litigation.

20
21 And, in Independent School District No. 281 (SEA MN 2000), a 19-year-old with a seizure
22 disorder, claimed that the district improperly ended services for him and improperly
23 graduated. The student prevailed. The hearing officer faulted the district for focusing

1 the student's program "on achieving enough credits to graduate, as opposed to preparing
2 him for post-secondary education or training."

3
4
5 **XI. High school diplomas and Graduation: Do you know where your diploma is?**

6
7 As discussed above, a diploma is a "property" interest under the 14th Amendment. SWD
8 are entitled to procedural due process protection regarding diplomas, including adequate
9 prior notice of the requirements, "fair testing," where applicable, and, for IEP students,
10 individualized decision making.

11 Schools are charged with developing standards—and maintaining them...

12
13 Brookhart, cited above. The Seventh Circuit ruled that a district's "desire to ensure the
14 value of its diploma by requiring graduating students to attain minimal skills is admirable
15 and the courts will interfere with educational policy decisions **only** when necessary to
16 protect individual statutory or constitutional rights." (Emphasis added).

17 *Denial of diplomas to handicapped children who have been receiving the special*
18 *education and relates services required by the Act, but are unable to achieve the*
19 *educational level necessary to pass the [test] is not a denial of a 'free appropriate*
20 *public education.*

21
22
23 See, Pinkerton Academy (NH) (OCR 2001), a private school case, which resulted in a
24 student's not earning a diploma because he failed the **attendance** requirement.

25
26 And see, Fort Wayne (IN) Community Schools (OCR 2002), where the student met the
27 attendance requirements and grade-point average requirements, but not the academic
28 levels requirements. That is, he did not take courses at the required proficiency level.
29 The OCR upheld the district's decision not to award a diploma to the student.

1 States (and districts) establish diploma requirements. The ED "encourages States to
2 establish high academic standards for all students." Standards may include proficiency
3 levels and tests to demonstrate same. Letter to Anonymous (OSEP 1996).

4
5 Courts have upheld the use of diploma tests for SWD (so long as the 14th Amendment
6 requirements are met).¹³ Minimum competency or other pre-requisite for diplomas and
7 course requirements, pass muster. District- or statewide requirements are not violative
8 of due process rights under the IDEA or Section 504, even if they mean that some
9 students will not be able to meet them. For example, see again Brookhart and see a recent
10 OCR Letter, Wythe County (VA) Public Schools (OCR 2004), upholding the state's high
11 school English/Writing graduation requirement. While the student did not pass, the OCR
12 found no violation, as the district had provided him with appropriate preparation and
13 accommodations--a meaningful opportunity to learn the knowledge and skills for the
14 assessment.

15
16 Were it otherwise, the courts would require--in fact--lower standards or substantial and
17 fundamental program alterations of requirements--and that would be a violation of Section
18 504! Standards are to be applied across the board to all students.

19
20 In Belen (NM) Consolidated School District (OCR 1999), the OCR dealt with a case about
21 standards. The parent alleged that the child was discriminated against because he did not
22 receive a diploma. The OCR found otherwise: the child had not completed the 26 credits

¹³ Note that courts have uniformly held that graduation ceremony, the prom, etc., do NOT have 14th Amendment property rights attached to them. Woodland Hills School District and Clovis Unified School District, cited above.

1 required and, along with some other 24 students who did not graduate because they did
2 not meet local standards.

3
4 Note, of course, that districts can also set non-academic standards. Once set, these need
5 to be well publicized in student handbooks and/or other notices.¹⁴ See, e.g., Richland (SC)
6 School District #2 (OCR 1999), where attendance (a nonacademic standard) was the
7 established policy, so that absences of more than 20 days per year resulted in non-credit
8 for a course. The OCR found the policy non-discriminatory. And see, Fayette County
9 (GA) School District (OCR 2005), where the OCR approved the district's attendance
10 practice for a child with Type 1 diabetes—evaluating each absence on a case-by-case basis.
11 The student was NOT given a blanket excusal—due to his impairment. See, Hernando (FL)
12 County School (OCR 1999), with same result for a student with Type I diabetes—who had
13 far too many unexcused absences. The district had accommodated him. It did not
14 promote him because he failed to master the required subject matter. The OCR upheld
15 the district's action.

16
17 And see, Pinkerton Academy, cited above. There, the student met the private Academy's
18 academic, but not attendance, requirements. He received the district's Alternate Diploma,
19 not the school's diploma. No Section 504 violation was found.

20 ***Practice note:** Once a district establishes standards, it should notify parents and*
21 *students about them--in plain language.*

¹⁴ North Hunterdon/Voorhees Regional (NJ) High School District (OCR 1996). The district's grading policy was pivotal in the OCR's finding that no violation had occurred.

1 A. Completing the IEP

2
3 **If a student completes IEP goals and objectives, does s/he automatically graduate**
4 **with a diploma?**

5
6 Not unless those goals and objectives also meet the district's and/or state's diploma
7 requirements. Note that OSEP has opined that states can leave it to districts and IEP
8 teams, if they so choose, to determine the graduation requirements for an individual child.

9 Letter to Davis-Wellington (OSEP 20030).

10
11 See, Northport v. Ambach, cited above, where high school students who did not meet
12 graduation requirements, in spite of adequate notice, did not have a reasonable
13 expectation of receiving a high school diploma.

14
15 See, also, the OCR's response to a similar situation in Special School District of St. Louis
16 County (MO) (OCR, 1989):

17 *[A] school district is not required to award a regular diploma to a handicapped*
18 *student who does not meet the requirements for a regular diploma, regardless of*
19 *whether the handicapped student has met the requirement of the IEP.*
20

21
22 Of course, the OCR went on, district must notify parents through the IEP Team process--
23 well in advance--if successful completion of an IEP will not result in the award of a regular
24 diploma "so that the parents may exercise their due process rights to challenge the
25 school's decision." Recall the importance of "informed consent."

26
27 Girard School District (SEA PA 2002). Parent opposed the student's graduation, insisting
28 that all IEP goals had not been met. However, the hearing panel upheld the graduation
29 because it was based on the IEP (as per state law); (1) The parties had agreed that
30 graduation would be based on course completion, not IEP goals; (2) the IEP ("far from
31 optimal") provided reasonable assessment of student's targeted areas of concern--reading

1 and math; (3) the student had made measurable progress; (4) the parent's triggering
2 concern was that medical insurance would end; and, (5) the student displayed a lack of
3 concern about her own progress. The panel found these reasons contrary to its equitable
4 authority.

5
6 **KEY:** Courts and hearing officers follow state and local standards.

7
8 **Are all special education students enrolled in public schools eligible to receive a**
9 **diploma?**

10
11 Yes, they are eligible, according to OCR's Letter to Runkel, cited above. However, whether
12 such students receive a diploma depends on state and local laws and requirements.
13 Neither the IDEA nor Section 504 guarantees that every student with a disability earns a
14 diploma when he graduates, even if he completes IEP requirements.

15
16 **B. Completing state and district diploma requirements**

17 SWD, along with their non-disabled peers, must meet ALL requirements to earn a diploma.
18 In Fort Wayne (IN) Community Schools, cited above, a student DID achieve grade-point-
19 average and attendance requirement, but failed the qualifying exam (and did not take
20 courses at appropriate levels for teachers to certify that he attained required proficiency
21 level). The OCR found no violation in the district's refusal to award the diploma.

22
23 These cases are great reminders: graduation may be viewed as a **three-legged table**--all
24 requirements must be met. Graduation is not based on a single criterion (such as an exit
25 exam or attendance alone). If any criterion are missing, the chair cannot stand and the
26 student does not earn a diploma. On the other hand, as above in Girard, the state may
27 exempt SWD to be exempt from state academic standards through the IEP process and
28 still receive a diploma. That is up to the state.

1 In Fort Bend Independent School District (SEA TX 2001), the parent sought to continue
2 the student's special education program. The district asserted that the student had met
3 all credit requirements and was exempted from the "exit level assessment instrument
4 because the modifications and accommodations provided during instruction would render
5 the result of the assessment invalid." The hearing officer upheld the graduation.

6 *Remember the importance of words: Students EARN a diploma; they are not DENIED*
7 *a diploma which they have EARNED.*
8
9

10 *What if a student completes all high school diploma requirements? Does he/she*
11 *receive a high school diploma, even if not wanted?*
12

13 Yes, in Churan v. Walled Lake Consolidated Schools, et al. (E.D. MI 1993), *affirmed*, (6th
14 Cir. 1995), a case involving a student with muscular dystrophy who required many medical
15 services. He wanted special education services to continue, after receiving his diploma.
16 The court dismissed his claim because he had passed mainstream classes and had received
17 career and college counseling.
18

19 *What if he did not receive counseling or do so well? See discussion of transition*
20 *planning above.*
21

22 *What if a student wished to dispute his/her diploma? How? When? Effective?*
23

24 While a diploma may not end a student's right to compensatory services (for deprivations
25 **before** the diploma was issued), it ends the entitlement to FAPE. Thus, it appears that if a
26 student wishes to contest his diploma, he must do so BEFORE the entitlement ends. T.S. v.
27 Independent School District # 54 (10th Cir. 2001).
28

29 NOTE: *Parens patriae* issues here. For example, failure of **child find** may come up even
30 AFTER graduation. In Hicks v. Purchase Line School District (D.C. W. PA 2003), a district

1 court allowed an 18-year-old high school graduate to sue the district for money damages
2 under Section 504, the IDEA, the ADA, and Section 1983 for its failure to identify and
3 evaluate him—as his performance in the last years of school was deteriorating. The court
4 found numerous “red flags” which should have alerted administrators. A cautionary tale
5 for all! It’s that *Parens patriae* always at work.

6
7 **C. High school diplomas with honors**

8
9 *Can honors requirements, which effectively exclude SWD, pass muster?*
10

11 It appears that they can. In Pueblo (CO) City School District 60 (OCR 1990), the OCR
12 upheld a policy which denied a complainant's request to graduate with honors. The district
13 excluded students in a LIFE/LIFT program from competing for graduation honors because
14 that program did not satisfy the honors requirements. The OCR upheld the district's
15 refusal because: (a) the parents had notice of the exclusion before placing the daughter in
16 the program and (b) the exclusion was based on educational reasons. It’s that
17 appropriate notice again!

18
19
20 **D. Different wording on high school diplomas/ different levels of diplomas**

21
22 *May a district have different wording on its diplomas?*
23

24 The OCR gave guarded approval to this, so long as the diploma is “similar in all ‘significant’
25 respects,” in Letter to Runkel, cited above. However, no definition of these terms was
26 given. The key here is that education is a local and state responsibility (under the 10th
27 Amendment), and states and districts are free to create policy, so long as it does not
28 impinge on federal laws.

1 The OCR wrote: "...variations of wording may not necessarily be a violation of Section 504
2 or Title II (of the ADA), so long as the wording is not based on disability as a category of
3 students." It should be based on the WHAT—not the WHO. Wording should be based on
4 "objective criteria and each possibility must be available to all students on a
5 nondiscriminatory basis." The diploma may refer "to the student's transcript for the
6 exact courses or subjects completed." Since possible variations of wording are "infinite,"
7 the OCR recommends, "an opinion be obtained in advance from either the Office of Public
8 Instruction or the OCR." A hearing decision, Salem-Kaiser School District (SEA OR 1999),
9 found that the district's use of three different exit documents did not violate state or
10 federal laws. The three were a **standard diploma**, an **alternate diploma**, and a **certificate**
11 **of attainment**.

12
13 See **Madison County (AL) School District** (OCR 1999), where three different exit
14 documents were approved: the **Alabama High School Diploma with Advanced Academic**
15 **Endorsement**, **Alabama Occupational Diploma**, and **Graduation Certificate**. See also,
16 **South LaPorte County Special Educational Cooperative**, (SEA IN 2000), where the "**Core**
17 **40" Diploma** was approved, **Putnam County School District** (SEA GA 1999), where a special
18 education diploma, as per state rules.

19 And see South Dakota's provision for three different graduation requirements: Standard,
20 Advanced, Distinguished.

21
22 And what about the graduation ceremony itself? In 1997, the OCR dealt with an allegation
23 of discrimination because a student with a disability was excluded. **Glen Ellyn Public**
24 **School District #41** (OCR, 1997). The OCR rejected the parent's allegation that the
25 student was excluded because of this disability. Rather, it found that the student was

1 excluded because of his misconduct. And see, Woodland Hills School and Clovis Unified
2 School District, cited above.¹⁵ Bottom line: the ceremony is not constitutionally protected.
3 Courts are reluctant to get involved.
4

5 **XII. Waivers, exceptions, and the slippery slope**

6 **Waivers of high school diploma requirements and course substitutions**

7

8 May a district waive diploma requirements for SWD? Yes, at its option--so long as the
9 modified requirements are in the students' (accepted) IEPs. There is no mandate to grant
10 waivers. See Churchill (NV) County School District (OCR 1995), where the OCR found no
11 violation when the district refused to apply a waiver to give the student credit for summer
12 school; Mobile (AL) County School Department (OCR 1995), a case involving homebound
13 services and school credit; and Boston Public Schools (SEA MA 1996), a case in which the
14 hearing officer did NOT order Boston to waive its exam policy to allow a student to be
15 promoted through attendance at summer school instead.

16
17 Requests for course substitutions. An educational institution may be required to provide
18 objective, professional reasons justifying its refusal to grant course substitutions to
19 SWD. *Ipse dixit* will not do.

20
21 For example, in Guckenberger v. Boston University (D. MA 1997),¹⁶ the court responded to
22 the learning-disabled students' request for course substitutions of the foreign language
23 requirement. It ordered the university to provide a "deliberative procedure for

¹⁵ Note that courts have uniformly held that graduation ceremony, the prom, etc., do NOT have 14th Amendment property rights attached to them.

¹⁶ Note that this material does not summarize the procedural issues in this case, which were largely won by the plaintiff-students.

1 considering whether modification of its degree requirement in foreign language would
2 fundamentally alter the nature of its liberal arts program."

3
4 Upon remand, the court found that the university provided such information. It did not
5 order waivers. Guckenberger v. Boston University (D. MA 1998). The university had (1)
6 adequately considered alternative means to accommodate SWD, their feasibility, cost and
7 effect on academic programs; (2) the decision to deny course substitution was made upon
8 professional, academic judgment; and (3) the university's refusal to substitute courses
9 did not violate the ADA or Sec. 504.

10
11 **Making exceptions --EXERCISE EXTREME CAUTION HERE!**

12
13 What if a district graduates a student through alternate graduation criteria? Generally, a
14 bad idea. In Cedarburg School District (SEA WI 2002), the hearing officer found that
15 the diploma deprived the student of FAPE, ordered it rescinded and services resumed.
16 See also Brockton Public Schools, a Massachusetts case that was not published, in which
17 the district waived a graduation requirement and ended up responsible for funding a
18 private out-of-state placement for the student.

19
20 Wenk v. Greater Muskegon Catholic Schools (MI Cir Ct. 2000). Parents claimed the
21 Catholic high school discriminated against their son when it failed to admit him. The court
22 agreed, in spite of its finding that the school acted in good faith. Because the court found
23 that the school had made numerous accommodations for other students, it ordered it to
24 do the same for this student. Contra, Fond du Lac (WI) School District (OCR 2001),

1 where the OCR upheld the school's denial of admission because it treated all applicants the
2 same and did not have a math program for the student.

3
4 U.S. Airways, Inc. v. Barnett (US 2001). In an employment case, the Supreme Court found
5 that consistency in company rules leads to the expectation of consistency. Exceptions may
6 dilute that expectation.

XIII. Policies and procedures--Practical suggestions

1. Know and be able to articulate the difference between an accommodation and a modification to yourself, staff, colleagues, parents, students, and hearing officers, when called upon. **Clarity is key!**
2. Understand that IPSE DIXIT will not do in modifications and accommodations procedures. Educators may be called upon to provide professional and reasoned judgment about accommodations, modifications, and alternate assessments.
3. Remember the "I" in IEP. The Team has to make individualized decisions.
4. Provide adequate notice about school and district testing, grading, report card, honors, and all other related policies.
5. Use 504 plans and IEPs appropriately. They are not interchangeable.
6. Treat regular education teachers and persons knowledgeable about standards like the key players in the Team decision-making they are.
7. Focus first on the WHAT of the curriculum or the test, then the WHO. Make decisions based on the objective course material (curriculum)--not the student.
8. "Beef up" remedial assistance when high stakes tests or retention or graduation policies are involved. Courts usually approve district and state programs that provide extra assistance and remediation for students who cannot pass the test.
9. Remember, first, last and always, this is a relationship business dealing with sensitive personal issues and challenges. Plain English goes a long way to ease tension and bridge communication gaps. Leave the jargon in college or at home!
10. Act on the fact that teachers are (supposed to be and act as if they are) experts. The courts are listening.
11. **Keep smiling!** Yours is the most fascinating, never-a-dull-moment, evolving, and important work! **Enjoy!**

COMMON ACRONYMS—Alphabet soup for NCLB, IDEA, and 504

504	Section 504 of the Rehabilitation Act of 1973.
ADA	Americans with Disabilities Act
AYP	Adequate yearly progress
ED	U.S. Department of Education
EHA	Education of All Handicapped Act (predated the IDEA)
ESEA	Elementary and Secondary Education Act
FAPE	Free, appropriate, public education
FERPA	Family Educational Rights and Privacy Act
IDEA	Individuals with Disabilities Education Act
IEP	Individualized Education Program or Plan
IEP Team	Individualized Education Program meeting
LEA	Local educational agency; school district
NAEP	National Assessment of Educational Progress ("the nation's report card")
NCLB	No Child Left Behind Act (2002); Title I--Title I of the ESEA
OCR	Office for Civil Rights of the U.S. Department of Education
OSEP	Office of Special Education Programs of the U.S. Department of Education (USDOE)
OSERS	Office of Special Education and Rehabilitative Services, USDOE
RTI	Response to intervention
SEA	state educational agency; state department of education
SES	Supplemental educational services
SWD	Students/children with disabilities

1 **CASES CITED**

2
3 Albertsons, Inc. v. Kirkingburg, U.S. 19 S. Ct. 2162 (1999)

4
5 Alexander v. Choate, 469 U.S. 287, 105 S. Ct. 712 (1985)

6
7 Ann Arbor (MI) Public School District, 30 IDELR 405 (OCR 1998)

8
9 Arlington (TX) Independent School District, 27 IDELR 612 (OCR 1997)

10
11 Association of Community Organizations for Change Now (ACORN) v. New York City Department of
12 Education, 103 LRP 42812 (D.C. S. N.Y. 2003)

13
14 Axelrod v. Phillips Academy, 30 IDELR 516 (D.C. MA 1999)

15
16 Barnett v. Memphis Public Schools, 42 IDELR 56 (6th Cir. 2004).

17
18 Belen (NM) Consolidated School District, 31 IDELR 142 (OCR 1999)

19
20 Biddeford School District, 44 IDELR 87 (SEA ME 2005)

21
22 Board of Education of Hendrick Hudson Central School District v. Rowley, 458 U.S. 176, EHLR
23 553:656 (1982)

24
25 Board of Education of Oceanside Union Free School District, 42 IDELR 288 (SEA NY 2004)

26
27 Board of Education of the Wappingers Falls Central School District, 44 IDELR 111 SEA NY 2005)

28
29 Boston Public Schools, 24 IDELR 985 (SEA MA 1996)

30
31 Bret Harte Union High School District, 30 IDELR 1014 (SEA CA 1999)

32
33 Brett v. Goshen Community School Corporation, 35 IDELR 152 (N. IN. D.C. 2001)

34
35 Brevard County (FL) School District, 23 IDELR 835 (OCR 1995)

36
37 Brookhart v. Illinois State Board of Education, 697 F. 2d 197, 184; EHLR 554:285 (7th Cir 1983)

38
39 Calallen Independent School District, 26 IDELR 482 (SEA TX 1997)

40
41 Carl D. v. Special School District, 28 IDELR 864 (C.D.E. MO 1998)

42
43 Cedarburg School District, 36 IDELR 220 (SEA WI 2002)

44
45 Centerville (OH) School District, 40 IDELR 20 (OCR 2003)

46
47 Cheltenham (PA) Township School District, 43 IDELR 86 (OCR 2004)

48
49 Churan v. Walled Lake Consolidated Schools, et al., 20 IDELR 1035 (E.D. MI 1993), *affirmed*, 22
50 IDELR 450 (6th Cir. 1995)

51
52 Churchill (NV) County School District, 22 IDELR 990 (OCR 1995)

53
54 Clovis Unified School District, 33 IDELR 146 (SEA CA 2000)

1 Community (IL) Consolidated School District # 15, 44 IDELR 70 (OCR 2005)
2
3 Corning (NY) Painted Post School District, 28 IDELR 752 (OCR, 1997)
4
5 Dade County (FL) School District, 28 IDELR 994 (OCR 1998)
6
7 Daugherty v. Hamilton County Schools, 26 IDELR 127 (D.C., E. TN., 1997)
8
9 Deal v. Hamilton County Board of Education, 42 IDELR 109 (6th Cir. 2004).
10
11 Debra P. v. Turlington, 474 F. Supp. 244 (M.D. Fla. 1979), modified and remanded, 644 F. 2d 397 (5th
12 Cir. 1981); aff'd, 730F. 2d 1405 (11th Cir. 1984); EHLR 555:445, 448 (11th Cir. 1984)
13
14 Doe v. Withers, 20 IDELR 422 (W. VA Cir. Ct. 1993)
15
16 Eric V. v. Causby, 977 F. Supp. 384 (E.D.N.C. 1997)
17
18 Fayette County Board of Education, 43 IDELR 37 (S.C. KY 2005)
19
20 Fayette County (GA) School District, 44 IDELR 221 (OCR 2005)
21
22 Fenton Area Public Schools, 44 IDELR 293 (SEA MI 2005)
23
24 Fisher v. Board of Education of the Christina School District, 41 IDELR 238 (Del 2004)
25
26 Florida State Department of Education, 28 IDELR 1002 (OCR 1998)
27
28 Fond du Lac (WI) School District, 36 IDELR 12 (OCR 2001)
29
30 Fort Wayne (IN) Community Schools, 36 IDELR 214 (OCR 2002)
31
32 Girard School District, 37 IDELR 298 (SEA PA 2002)
33
34 GI Forum et al. v. Texas Education Agency, 87 F. Supp. 2nd 667 (W.D. TX 2000)
35
36 Glen Ellyn Public School District #41, 28 IDELR 882 (OCR, 1997)
37
38 Goliad Independent School District, 42 IDELR 218 (SEA TX 2004)
39
40 Gonzaga University v. ED (2002)
41
42 Goleta Union Elementary School District v. Ordway, 38 IDELR 64 (D.C. CA 2002)
43
44 Greenville County (SC) School District, 33 IDELR 195 (SEA SC 2000)
45
46 Guckenberger v. Boston University, 74 F. Supp. 106; 26 IDELR 573, 598 (D. MA 1997), 8 F.
47 Supp. 2d 82 (D. Mass. 1998).
48
49 Hamilton County School, 23 IDELR 772 (SEA TN 1996)
50
51 Hawaii State Department of Education, 17 IDELR 360 (Oct. 1990)
52
53 Heather S. v. Wisconsin, 26 IDELR 870 (7th Cir. 1997)

1 Hernando (FL) County School, 31 IDELR 89 (OCR 1999)
2
3 Hicks v. Purchase Line School District, 39 IDELR 92 (D.C. W. PA 2003)
4
5 Hopewell (PA) Area School District, 26 IDELR 1025 (OCR 1997)
6
7 Hornstine v. Moorestown, 103 LRP 23234 (D. NJ 2003)
8
9 Humble (TX) Independent School District, 44 IDELR 218 (OCR 2005)
10
11 Independent School District No. 281, 33 IDELR ¶ 265 (SEA MN 2000)
12
13 Jefferson County School District R-1, 39 IDELR 119 (SEA CO 2003)
14
15 Kevin T. v. Elmhurst Community School District # 205, 36 IDELR 153 (N.D. Ill. 2002)
16
17 Lafourche Parish (LA) Public Schools, 33 IDELR 69 (OCR 2000)
18
19 Letter to Anonymous, 22 IDELR 456 (OSEP 1994)
20
21 Letter to Anonymous, 25 IDELR 632 (OSEP 1996)
22
23 Letter to Copenhaver, 25 IDELR 640 (OSEP 1995)
24
25 Letter to Davis-Wellington, 40 IDELR 182 (OSEP 2003).
26
27 Letter to Gloeckler, 103 LRP 49608 (OSERS 2003)
28
29 Letter to Moore, 39 IDELR 189 (OSEP 2002)
30
31 Letter to Runkel, 25 IDELR 387 (OCR 1996)
32
33 Livermore Valley Joint Unified School District, 33 IDELR 288 (SEA CA 2000)
34
35 Los Angeles Unified School District, 33 IDELR 207 (SEA CA 2000)
36
37 Los Angeles Unified School District, 43 IDELR 45 (OCR 2005)
38
39 Madison County (AL) School District, 32 IDELR 36 (OCR 1999)
40
41 Mason City Community School District, 21 IDELR 248 (IA 1994)
42
43 Metropolitan (TN) Public School District, 18 IDELR 971 (OCR, 1991)
44
45 Middlesex Borough Board of Education, 38 IDELR 232 (SEA NJ 2003)
46
47 M.L. v. Federal Way School District, 42 IDELR 57 (9th Cir. 2004)
48
49 Mobile County Board of Education, 26 IDELR 695 (SEA AL 1997)
50
51 Mobile (AL) County School Department, 23 IDELR 353 (OCR 1995)
52
Monterey (CA) Peninsula Unified School District, 38 IDELR 220 (OCR 2002)

1 Montgomery County Public Schools, 40 IDELR 24 (SEA MD 2003)
2
3 Montgomery Township Board of Education, 43 IDELR 186 (3d. Cir. 2005)
4
5 Murphy v. UPS, 119 S. Ct. 2133 (1999)
6
7 Nevada State Department of Education, 25 IDELR 752 (OCR 1996)
8
9 North Carolina Dept. of Public Instruction, 43 IDELR 229 (OCR 2005)
10
11 Northeast (TX) Independent School District., 24 IDELR 298 (OCR 1995)
12
13 North East Independent School District, 40 IDELR 168 (SEA TX 2003).
14
15 North Hunterdon/Voorhees Regional (NJ) High School District, 25 IDELR 165 (OCR 1996)
16
17 Northport v. Ambach, 90 A.D.2d 227. 458 N.Y.S. 2d 680 (1982), aff'd 60 N.Y. 2d 758 (Ct. App.
18 1983)
19
20 North East Independent School District, 40 IDELR 168 (SEA TX 2003)
21
22 Northeast (TX) Independent School District, 23 IDELR 52 (OCR 1995)
23
24 Palatine (IL) Community Consolidated School District # 15, 42 IDELR 181 (OCR 2004)
25
26 Perry (OH) Public School District, 41 IDELR 72 (OCR 2003)
27
28 PGA TOUR Inc. v. Martin, 121 S. Ct. 1879 (2001)
29
30 Pinkerton Academy (NH), 36 IDELR 137 (OCR 2001)
31
32 Polk County Board of Education, 43 IDELR 129 (SEA FL 2004)
33
34 Prince George's County (MD) Public Schools, 33 IDELR 279 (OCR 2000)
35
36 Prince William County (VA) School Division, 25 IDELR 538 (OCR 1996)
37
38 Pueblo (CO) City School District 60, 17 IDELR 535 (OCR 1990)
39
40 Putnam County School District, 32 IDELR 160 (GA 1999)
41
42 Rene v. Reed; 32 IDELR 196 (IN 2000)
43
44 Salem-Kaiser School District, 30 IDELR 1024 (SEA OR 1999)
45
46 School Board of Nassau County v. Arline, 480 U.S. 273 (1987)
47
48 Shapiro v. Paradise Valley Unified School District #69, 38 IDELR 91 (9th Cir. 2003)
49
50 Sherman and Nishanian v. Mamaroneck Union Free Sch. Dist., 39 IDLER 181 (2nd Cir. 2003)
51
52 Southeastern Community College v. Davis, 442 U.S. 397 (1979)
53
54 South LaPorte County Special Educational Cooperative, 34 IDELR 56 (SEA IN 2000)

1 Special School District of St. Louis County (MO), 16 IDELR 307, 308 (OCR, 1989)
2
3 State Department of Education (GA), EHLR 352:480 (OCR 1987)
4
5 Student No. 9 v. Board of Education, 40 IDELR 152 (MASS. 2004)
6
7 Sutton v. United Air Lines, 119 S. Ct. 2139 (1999)
8
9 Sweetwater (CA) Union High School District, 33 IDELR 133 (SEA CA 2000)
10
11 T. B. and E. B. v. Warwick School Committee, et al., 40 IDELR 253 (1st Cir. 2004)
12
13 Toyota Motor Mfg. v. Ella Williams, 122 S. Ct. 618, 691 (2002)
14
15 U.S. Airways, Inc. v. Barnett, 122 S. Ct. 1516 (US 2001)
16
17 Virginia Department of Education, 27 IDELR 1148 (OCR 1997)
18
19 Watson v. Kingston City School District, 43 IDELR 253 (2nd Cir. 2005).
20
21 Wenk v. Greater Muskegon Catholic Schools, 34 IDELR ¶ 258 (MI Cir Ct. 2000)
22
23 Westport Board of Education, 40 IDELR 85 (SEA CT 2003)
24
25 Woodland Hills School District, 32 IDELR 5 (Comm. Ct. PA 2000)
26
27 Wynne v. Tufts University School of Medicine, 932 F. 2 19 (1st Cir. 1991); Rehearing en banc, 976 F.
28 2d 791 (1st Cir. 1992)
29
30 Wythe County (VA) Public Schools, 42 IDELR 125 (OCR 2004)
31
32 Yankton School District v. Schramm, 24 IDELR 704 (8th Cir. 1996)
33
34 Ysleta Independent School District, 33 IDELR 53 (SEA TX 2000)

SUGGESTED READING AND WEBSITES

"A Better Balance: Standards, Tests, and The Tools To Succeed," Education Week, Volume XX, Number 17 (January 11, 2001).

Education Law Reporter (West), "High Stakes Testing Accommodations and Modifications for Students with Disabilities," Perry A. Zirkel, 155 Ed. Law Rep. (13) (Sept. 13, 2001).

Education Law Reporter (West), "Testing Condition Accommodations for Disabled Students," S. E. Phillips, 80 Ed. Law Rep. (9) (March 25, 1993).

Education Next--A Journal of Opinion and Research, "Disabling the SAT," Miriam Kurtzig Freedman, Fall 2003. Can be read on line: www.educationnext.org.

Grades, Report Cards, etc...and the Law, Miriam Kurtzig Freedman (School Law 123 2005). Information and order form available at www.schoolawpro.com.

Meeting NCLB's Mandates: Your Quick-Reference Guide to Assessments and Accountability, Miriam Kurtzig Freedman (LRP Publications 2004) Available at custserve@lrp.com.

National Center for Educational Outcomes (NCEO) Policy Directions and other publications. www.coled.umn.edu/NCEO/OnlinePubs/

"Nondiscriminatory Use of High-Stakes Tests: Combining Professional Test-Use Standards with Federal Civil-Rights Enforcement," Jay P. Heubert, J.D., Ed. D., 133 Ed. Law Rep., [17] (May 13, 1999).

Rethinking Special Education for a New Century, Chester E. Finn, Jr., Andrew J. Rotherham, and Charles R. Hokanson, Jr., Editors; Progressive Policy Institute and Fordham Foundation (2001).

Taking Responsibility for Ending Social Promotion, A Guide for Educators and State and Local Leaders, U.S. Department of Education, May 1999. www.ed.gov.

Testing, Grading, and Granting Diplomas to Special Education Students, Miriam K. Freedman, IDELR Special Report # 18, LRP Publications, Horsham, PA. (2000).

Student Testing and the Law: The requirements educators, parents and officials need to know in plain English, Miriam Kurtzig Freedman, LRP Publications, 2005. www.lrp.com.

Testing Students with Disabilities: Practical Strategies for Complying with District and State Requirements, Martha L. Thurlow, Judy L. Elliott, James E. Ysseldyke, Corwin, 1998.

The Special Educator, LRP Publications, Horsham, PA, March 23, 2001, April 6, 2001, June 15, 2001, and July 27, 2001; November 1, 2002; March 21, 2003; June 13, 2003, articles by (or quoting) presenter Miriam Kurtzig Freedman, M.A., J.D.

1 The School Administrator, "Fair and Unfair Testing Accommodations," Lynn S.
2 Fuchs and Douglas Fuchs, November 1999.

3
4 The Use of Tests as Part of High-Stakes Decision Making for Students: A
5 Resource Guide for Educators and Policy-Makers. U.S. Department of Education, Office
6 for Civil Rights, December 2000. www.ed.gov/offices/OCR/testing.

7 8 **SELECTED USEFUL WEBSITES**

9
10 **To find cases on the web:** findlaw.com

11
12 For information about NCLB: www.ed.gov/offices/OESE

13
14 For information about IDEA: www.ed.gov/offices/OSERS/OSEP

15
16 For information about Section 504: www.ed.gov/offices/OCR

17
18 **Also of interest...**

19
20 Council for Exceptional Children: cec.sped.org.

21
22 Education Next: educationnext.org

23
24 Federation for Children with Special Needs: fcsn.org

25
26 Fordham Foundation. www.edexcellence.net

27
28 National School Board Association: NSBA.org

29
30 IDEApractices. org.

31
32 National Center for Educational Outcomes: www.coled.umn.edu

33
34 Progressive Policy Institute: ppionline.org

35
36 School Law Pro (Miriam Kurtzig Freedman's website) schoollawpro.com

37
38 Wrightslaw.com

A Model 504 Accommodation Plan

Recall the basics! And recall that while there is NO requirement that "504 plans" be written, having a written plan is often useful. All decisions are team judgment calls.

A disabled person is one who has a physical or mental impairment which substantially limits one or more of such person's major life activities; has a record of such an impairment, or is regarded as having such an impairment .

DETERMINING ELIGIBILITY

The regulations, at 34 CFR 104.35(c) tell schools how to develop 504 accommodation plans. Three steps are required in interpreting evaluation data and in making placement decisions. A school shall:

- 1—draw upon information from a **variety of sources**, including aptitude and achievement tests, **teacher** recommendations, physical condition, social or cultural background and adaptive behavior
- 2—establish procedures to ensure that information obtained from **all such sources** is **documented** and carefully **considered**
- 3—ensure that the placement decision is made by a **group of persons**, including persons **knowledgeable** about the child, the meaning of evaluation data, and the placement options.

DETERMINING APPROPRIATE NECESSARY ACCOMMODATIONS

If eligibility is determined, **necessary** accommodations may be provided. Accommodations are determined by the team and may/may not be those sought by parents or students. Such accommodations are not to give an advantage to the student. Nor are they supposed to fundamentally alter the program, standards, or what students are expected to know and do. Accommodations are designed to give all (including student with disabilities) an equal opportunity to access the program. They are not designed to equalize outcomes.

*Accommodations level the playing field
without changing the game!*

THE PLAN—determining eligibility

1. Name of student; birth date; other identifying information

2. Members of the 504 team. And why each is there. What does each have knowledge about? (The child? The evaluation data? The placement options?)
Be sure that each of the above three types of knowledge are represented at the team.

Name

Knowledgeable about

<hr/>	<hr/>
<hr/>	<hr/>
<hr/>	<hr/>
<hr/>	<hr/>

3. Sources of evaluation information. List each source. The plan does not require that each be summarized—just listed. In most cases, there should be more than one source; hopefully, some generated by school personnel who know the child.

4. List the physical or mental impairment by name. Again, no summary or description is required.

5. List the major life activity (ies) affected. Focus on the activity as a whole: i.e., learning—not math or writing; emotional impairment—not self-esteem

6. Quantify the degree of impact. On a scale of 1 to 10, is it about an 8? Use descriptors as mild, moderate, sometimes, and often—to find no eligibility; descriptors as serious, substantial, almost always, etc.—to find eligibility. Compare the student to the average in the region (not, e.g., the average at a high achievement school.)

THE PLAN—providing necessary accommodations

7. **ACCOMMODATIONS:** If eligibility is determined, decide what accommodations the student needs in order to have the same opportunity at school as his/her nondisabled peers. Again, relate the nondisabled peers at an average level.

8. **SIGNATURES?** While not required, it is generally good practice to have the parents sign to confirm that they received NOTICE of the 504 plan and their procedural rights under Section 504. Such rights give parents an opportunity to dispute the findings of the 504 team.

ACTION--implement the 504 plan as soon as it is developed

Helpful definitions for 504 meetings

ADAPTATIONS:

The umbrella term for **changes** in a test or course that an IEP or Section 504 plan provides for a student with a disability which are different from what is provided for non-disabled students. Such changes are called "appropriate accommodations" in the IDEA; "aids, benefits and services" in Section 504; or "adaptations" or "accommodations" in the NCLB. The use of these various terms has led to confusion nationwide. The term, adaptation, as used herein **does not consider the effect of the change on standard or achievement being measured.**

In contrast, the following two terms DO focus on the effect of the adaptation on test standards, skills measured, level of difficulty, etc.

ACCOMMODATIONS (ALSO CALLED APPROPRIATE ACCOMMODATIONS OR STANDARD ACCOMMODATIONS):

Changes in test/course presentation, location, timing, student response, or other attribute which are **necessary** to provide **access** for a student with a disability to participate (including providing the student with an opportunity to demonstrate what s/he knows and can do) and which **do not fundamentally alter** or lower the achievement level or expectations of the test. *Accommodations level the playing field.*

MODIFICATIONS (ALSO CALLED NON-STANDARD ACCOMMODATIONS):

Changes in test/course presentation, location, timing, student response, or other attribute which are **necessary** to provide **access** for a student with a disability to participate (including providing the student with an opportunity to demonstrate what s/he knows and can do) but which **do fundamentally alter** or lower the achievement level or expectations of the test. *Modifications change the game.*

KEY: Because each test/course is different and measures/teaches different skills and knowledge, in order to maintain test/course validity, reliability, and, for tests to meet technical testing standards, each test has its own set of (allowed) accommodations and (not allowed) modifications. *There is no one size fits all.*